United States Court of Appeals
For the Eighth Circuit

No. 18-2423

Victor Bernard Williams, M.D.

Plaintiff - Appellant

v.

Baptist Health, doing business as Baptist Health Medical Center; Douglas Weeks, Individually and in his Official Capacity as Sr. Vice-President and Administrator; Everett Tucker, M.D., Individually and in his Official Capacity as a Member of the Credentials Committee; Tim Burson, M.D., Individually, and in his Official Capacity as Chief of Surgery and Chairperson of the Surgery Control Committee; Scott Marotti, M.D., Individually, and in his Official Capacity as a Member of the Surgery Control Committee; Susan Keathley, M.D., Individually, and as Chairperson of the Credentials Committee; Chris Cate, M.D., Individually, and as Chairman of the Executive Committee and Chief of Staff; Surgical Clinic of Central Arkansas; John E. Hearnsberger, II, M.D., Individually; Joseph M. Beck, M.D., Individually; Charles Mabry, M.D., Individually; James Counce, M.D., Individually

Defendants - Appellees

Appeal from United States District Court

for the Eastern District of Arkansas - Little Rock

Submitted: May 23, 2019
Filed: May 29, 2019
[Unpublished]

Before BENTON, STRAS, and KOBES, Circuit Judges.

PER CURIAM.

Victor Williams, M.D., filed this action against a medical center, six of its employees, a surgical clinic, two members of the Arkansas State Medical Board, and two of the Medical Board's consulting physicians alleging a conspiracy to revoke his medical license in violation of state law and 42 U.S.C. §§ 1981, 1982, and 1983. Willams appeals the district court's[1] dismissal of his claims against numerous defendants, and grant of summary judgment against the remaining defendants. After careful de novo review, see Marsh v. Phelps Cty., 902 F.3d 745, 751 (8th Cir. 2018) (de novo review of grant of summary judgment); Smith v. Johnson, 779 F.3d 867, 870 (8th Cir. 2015) (de novo review of dismissal based on res judicata), we affirm.

We agree with the district court that Williams's claims against several defendants were barred by res judicata. See Finstand v. Beresford Bancorporation, Inc., 831 F.3d 1009, 1014 (8th Cir. 2016) (federal suit was barred because, under state law, prior judgment

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[1] The Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas.

precluded claims that could have been raised in prior actions); Baptist Health v. Murphy, 373 S.W.3d 269, 278 (Ark. 2010) (when case is based on same events as first lawsuit, res judicata applies even if second lawsuit raises new legal issues and seeks additional remedies). We conclude that the district court properly granted summary judgment for the remaining defendants, as those claims were barred by absolute quasi-judicial or statutory immunity. See Ark. Code Ann. § 17-80-103(West 2018) (amended 2019) (no individual acting on behalf of medical board shall be liable for action taken or recommendation made within scope of board's functions); Briscoe v. LaHue, 460 U.S. 325, 345 (1983) (extending absolute judicial immunity to witnesses); Buser v. Raymond, 476 F.3d 565, 570-71 (8th Cir. 2007) (state medical board member had absolute quasi-judicial immunity for performing judicial functions). We find no error in the district court's summary denial of Williams's Federal Rule of Civil Procedure 59(e) and 60(b) motion. See Auto Servs. Co., Inc. v. KPMG, LLP, 537 F.3d 853, 857 (8th Cir. 2008) (abuse of discretion review).

Accordingly, we affirm the judgment of the district court. See 8th Cir. R. 47B.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2423

Victor Bernard Williams, M.D.

Plaintiff – Appellant

v.

Baptist Health, doing business as Baptist Health Medical Center; Douglas Weeks, Individually and in his Official Capacity as Sr. Vice-President and Administrator; Everett Tucker, M.D., Individually and in his Official Capacity as a Member of the Credentials Committee; Tim Burson, M.D., Individually, and in his Official Capacity as Chief of Surgery and Chairperson of the Surgery Control Committee; Scott Marotti, M.D., Individually, and in his Official Capacity as a Member of the Surgery Control Committee; Susan Keathley, M.D., Individually, and as Chairperson of the Credentials Committee; Chris Cate, M.D., Individually, and as Chairman of the Executive Committee and Chief of Staff; Surgical Clinic of Central Arkansas; John E. Hearnsberger, II, M.D., Individually; Joseph M. Beck, M.D., Individually; Charles Mabry, M.D., Individually; James Counce, M.D., Individually

Defendants - Appellees

Appeal from U.S. District Court for the Eastern

District of Arkansas - Little Rock (4:17-cv-00205-JM)

JUDGMENT

Before BENTON, STRAS, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 29, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VICTOR BERNARD WILLIAMS, M.D.
PLAINTIFF

V. **4:17CV00205 JM**

BAPTIST HEALTH d/b/a BAPTIST HEALTH MEDICAL CENTER, et al **DEFENDANTS**

JUDGMENT

Pursuant to the Orders of the Court granting summary judgment, judgment is hereby entered in favor of the Defendants and against the Plaintiff.

IT IS SO ORDERED this 31st day of May, 2018.

_____
James M. Moody Jr.
United States District

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VICTOR BERNARD WILLIAMS, M.D.
PLAINTIFF

V. 4:17CV00205 JM

BAPTIST HEALTH d/b/a BAPTIST HEALTH MEDICAL CENTER, et al DEFENDANTS

ORDER

Pending is the Motion for Summary Judgment filed by Joseph M. Beck, M.D. and John E. Hearnsberger, M.D. Plaintiff alleges that Dr. Beck and Dr. Hearnsberger (the "Doctors") discriminated against him based upon his race and retaliated against him for filing suit against them and complaining about racial discrimination. Plaintiff claims that the Doctors conspired to violate Plaintiff's procedural and substantive due process rights, and his right to equal protection of the laws. Specifically, Plaintiff alleges that the Doctors caused him damage because of the revocation of his medical license by the Arkansas State Medical Board ("ASMB" or the "Board"), as well as the Board's failure to accurately report to the National Practitioner Data Bank ("NPDB") the voiding of the revocation of Plaintiff's medical license subsequent to June 4, 2015. Further, Plaintiff's cause of action against the Doctors also relates to the "Arkansas State Medical Board's failure to afford Plaintiff the opportunity to prosecute his civil action against the Baptist defendants consistent with the Board's normal policies and process

enjoyed by other physicians." (Pl.'s Response to Mot. For Summ. Judg., ECF No. 133 at p. 6-7). Plaintiff's complaint also includes state law claims of abuse of process, tortious interference with contracts and defamation.

Dr. Hearnsberger was appointed to the ASMB in 2009 and served on the Board until June 2015. Dr. Hearnsberger participated in Board discussions and the investigation into Plaintiff's medical practice between 2010 and 2015. Plaintiff claims that Dr. Hearnsberger conducted an unauthorized investigation of Plaintiff's medical practice and provided false information to the Board. Dr. Hearnsberger was a named defendant in *Williams I* (Pulaski County Circuit Court, Civil Action No. 60CV-14-808). On December 8, 2014, the Pulaski County Circuit Court entered an order granting Dr. Hearnsberger's Motion for Summary Judgment in his individual capacity. On November 5, 2015, by agreement between the Plaintiff, the Arkansas State Medical Board and Dr. Hearnsberger in his official capacity, the Pulaski County Circuit Court conditionally dismissed with prejudice Plaintiff's claims against the Board and Dr. Hearnsberger *Williams I*.

Dr. Joseph Beck was appointed to the Board in 2003 and served on the Board until December 2016. Dr. Beck was the Chairman of the Board during the time that the Board was investigating Plaintiff's medical practice and voted to revoke Plaintiff's medical license. As Chairman, Dr. Beck was not a voting member except in case of a tie. Dr. Beck did not participate in any vote regarding Plaintiff. Dr. Beck was not named individually in *Williams I*. However, he was a member of the ASMB, which was a named defendant.

The Arkansas State Medical Board is a state entity. Drs. Hearnsberger and Beck were acting in their

capacity as members of the Board when they participated in the Board's investigation and the discussions of Plaintiff's case. Arkansas Code Section 17-80-103 provides:

> No member of a board, or any individual acting on behalf of the board of any profession or occupation classified under the laws of the State of Arkansas as a profession of the healing arts shall be liable in damages to any person for slander, libel, defamation of character, breach of any privileged communication, *or otherwise for any action taken or recommendation made within the scope of the functions of the board* if the board member or the individual acting on behalf of the board acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to him or her after a reasonable effort is made to obtain the facts on which the action is taken or the recommendation is made. Ark. Code Ann. § 17-80-103.

After reviewing the record, including all deposition testimony and transcripts from Board meetings, there is no evidence that Drs. Hearnsberger or Beck acted outside the scope of the functions of the ASMB. Plaintiff has provided no evidence that the Doctors acted with malice toward the Plaintiff or that they acted with illegal or improper motives when participating in the proceedings regarding the Plaintiff. There is no evidence that the Doctors communicated with the National Practitioner Data Bank or directed that anyone give false information to the NPDB regarding the Plaintiff. For these reasons, the Court finds that Defendants Hearnsberger and Beck are

immune from suit for all federal and state law damage claims pursuant to Ark. Code Ann. § 17-80-103.[1]

Even if the Doctors were not immune to Plaintiff's claims, Plaintiff has failed to present any evidence that the actions taken by Doctors Hearnsberger or Beck regarding Plaintiff's licensure were based on racial animus or in retaliation. There is no evidence that Plaintiff's race was a consideration by Doctors Hearnsberger or Beck or that the Doctors were involved in reporting to the NPDB. Mere speculation by the Plaintiff that the Defendants' actions, or inaction, were racially motivated is insufficient to defeat a motion for summary judgment. *See Williams v. Mannis*, 889 F.3d 926 (8th Cir. 2018) (quoting *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 801 (8th Cir. 2011) ("To survive a motion for summary judgment, the nonmoving party must substantiate his allegations with sufficient probative evidence [that] would permit a finding in [his] favor based on more than mere speculation, conjecture, or fantasy.").

As stated in the Court's previous orders, claims arising from the facts included in *Williams I* are barred by res judicata. Plaintiff's claims regarding the information sent to the NPDB by ASMB was considered in *Williams I* when Plaintiff filed his motion to enforce settlement on August 19, 2015. (Exh. 35 to Pl's Resp. to Mot. For Summ. J.). The court ruled that the Board's version of the Consent Order properly memorialized the settlement agreement between the

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[1] The Court declines to analyze Plaintiff's claims for injunctive relief because the Doctors are no longer members of ASMB and have no authority to correct reports sent to the NPDB or keep accurate minutes of ASMB investigations.

parties. The Board's version of the Consent Order, which was filed in the case on November 5, 2015, did not include the Plaintiff's proposed language regarding reports made to the NPDB by the ASMB. Dr. Hearnsberger, in his official capacity, and the AMSB, of which Dr. Beck was the chairman, were named defendants in *Williams I* and were dismissed with prejudice on November 5, 2015.

The Motion for Summary Judgment filed by Defendants Hearnsberger and Beck (ECF No. 107) is GRANTED. The Clerk is directed to close the case. The trial scheduled for June 18, 2018 is cancelled.

IT IS SO ORDERED this 31st day of May, 2018.

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James M. Moody Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VICTOR BERNARD WILLIAMS, M.D.
PLAINTIFF

V. **4:17CV00205 JM**

BAPTIST HEALTH d/b/a BAPTIST HEALTH MEDICAL CENTER, et al **DEFENDANTS**

ORDER

Pending are the Motions for Summary Judgment filed by James Counce and Charles Mabry. Plaintiff alleges that Dr. Counce and Dr. Mabry conducted a peer review of the records of three of Plaintiff's patients at the request of the Arkansas State Medical Board in 2010. The Arkansas State Medical Board is a state entity. Drs. Counce and Mabry were acting on behalf of the Arkansas State Medical Board when they provided their review and reports.

Arkansas Code Section 17-80-103 provides that no member of a board, or any individual acting on behalf of the board of any profession or occupation classified under the laws of the State of Arkansas as a profession of the healing arts shall be liable in damages to any person for slander, libel, defamation of character, breach of any privileged communication, *or otherwise for any action taken or recommendation made within the scope of the functions of the board* if the board member or the individual acting on behalf of the board acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to him or her after a reasonable effort is made to

obtain the facts on which the action is taken or the recommendation is made. Ark. Code Ann. § 17-80-103.

There is no evidence in the record that the doctors acted with malice or that they acted with illegal or improper motives. The Court finds that Defendants Counce and Mabry are immune from suit. *See Buser v. Raymond*, 476 F.3d 565, 569 (8th Cir. 2007) ("Even where an official is not a Board member, and thus he is one step removed from the 'judicial' function of the Board, he nevertheless may be entitled to absolute quasi-judicial immunity if he is engaged in a protected [ ] function.") (internal quotation omitted).

Further, the Court has previously found that the claims made in Plaintiff's Complaint are barred by res judicata. As stated in the previous Order, Plaintiff cannot claim that the revocation of his license in April 2014 created a "new" claim that has not been litigated. The specific issue was before the court in *Williams I*. Plaintiff's claim against Drs. Counce and Mabry are based upon the same facts. Plaintiff did not include Counce and Mabry as defendants but he was well aware of their reports during the time *Williams I* was pending. Res judicata bars Plaintiff's claims against Drs. Counce and Mabry because they could have been litigated in *Williams I*.

The Motions for Summary Judgment filed by Defendants' Counce and Mabry (ECF Nos. 55, 58, 83 and 86) are GRANTED. The Clerk is directed to dismiss Plaintiff's Complaint against Defendants James Counce and Charles Mabry.

IT IS SO ORDERED this 8th day of March, 2018.

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James M. Moody Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

VICTOR BERNARD WILLIAMS, M.D.
PLAINTIFF

V. 4:17CV00205 JM

BAPTIST HEALTH d/b/a BAPTIST HEALTH MEDICAL CENTER, et al
DEFENDANTS

ORDER

Plaintiff Victor Bernard Williams, M.D. filed suit in this Court on March 31, 2017 against Baptist Health d/b/a Baptist Health Medical Center ("Baptist"), the Surgical Clinic of Central Arkansas (the "Clinic") and several doctors in their individual and/or official capacities for violation of 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1988, the Fourteenth Amendment to the United States Constitution, the tort of abuse of process, tortious interference with contracts and defamation. Defendants Baptist, Doug Weeks, Everett Tucker, M.D., Tim Burson, M.D., Scott Marotti, M.D., Susan Keathley, M.D., Christy Cate, M.D., and the Clinic (collectively the "Baptist Defendants) filed a motion to dismiss Plaintiff's Complaint based upon 1) res judicata, 2) statute of limitations, 3) Baptist Defendants are not state actors, and 4) failure to plead conspiracy claims with factual specificity.

Plaintiff is a surgeon specializing in cardiothoracic, vascular and general surgery. Plaintiff alleges that the Defendants conspired to have his surgical staff privileges revoked at Baptist in 2010, to

have the Arkansas Medical Board (the "Board") place restrictions on his ability to practice medicine from 2010 through 2013, and to have the Board revoke his medical license on the basis of his race. Plaintiff alleges that the Defendants retaliated against him for filing a state court action against them and for seeking assistance from the Board to investigate his claim of discrimination.

On February 25, 2014, Plaintiff filed suit against Baptist Health, Doug Weeks, Everett Tucker, M.D., Tim Burson, M.D., Scott Marotti, M.D., Susan Keathley, M.D., and Christy Cate, M.D. in Pulaski County Circuit Court, 60CV-14-808 ("*Williams I*"). The only Baptist Defendant not included in the *Williams I* suit was the Surgical Clinic of Arkansas. In *Williams I*, Plaintiff's claims were based upon the termination of his medical staff privileges by the *Williams I* Defendants. Specifically, Plaintiff asserted the following causes of actions: violation of Article 2, §§ 2, 3, 8, 13, and 21 of the Arkansas Constitution, retaliation and conspiracy to violate the Arkansas Civil Rights Act, tortious interference with contracts, defamation, violation of his civil right to engage in the practice of medicine, and violation of Baptist Health's By-Laws and Professional Staff Rules. The circuit court dismissed all of Plaintiff's claims except for the violation of Baptist's By-Laws and Professional Staff Rules claim. At a bench trial in 2017, the circuit court found in favor of the Defendants on this claim as well. Plaintiff has filed a Notice of Appeal as to all of these claims.

The Baptist Defendants argue in the Motion to Dismiss that the instant case is barred by res judicata because Plaintiff brought essentially the same case in *Williams I*. The claim- preclusion aspect of res judicata bars relitigation of a suit when "(1) the first suit

resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies." *Baptist Health v. Murphy*, 373 S.W.3d 269, 278 (Ark. 2010) (citing *Beebe v*, *Fountain Lake School Dist.*, 231 S.W.3d 828, 635 (Ark. 2006)). "Res judicata bars not only the relitigation of claims that were actually litigated in the first suit, but also those that could have been litigated." *Id.* "Where a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies." *Daily v. Langham*, 522 S.W.3d 177, 181 (Ark. App. 2017).

Plaintiff does not dispute that *Williams I* resulted in a final judgment on the merits, that the circuit court had jurisdiction over the case, and that both the instant case and *Williams* I involved the same parties or their privies. *See Crockett & Brown, P.A. v. Wilson*, 864 S.W.2d 244, 246 (Ark. 1993) ("A judgment may be final for purposes of res judicata even if an appeal is taken.); *Winrock Grass Farm*, 373 S.W.3d 907 (Ark. App. 2010) (Privity of parties within the meaning of res judicata means a person so identified in interest with another that he represents the same legal right.); *Crockett v. C.A.G. Invs., Inc.*, 381 S.W.3d 793, 799 (Ark. 2011) (The Arkansas Supreme Court has "never required strict privity in the application of res judicata...."). Plaintiff argues that *Williams I* was not fully contested and that both suits do not involve the same claims or causes of action.

Plaintiff claims that *Williams I* was not fully contested in good faith because he was not allowed to obtain information related to similarly situated

physicians. Pursuant to Arkansas law, the *Williams I* court denied Plaintiff's motions to compel the defendants to produce information regarding physicians who had lost their hospital privileges. Plaintiff argues he could not fully litigate his claims without this information and therefore the claims should not be barred by res judicata. In support of this argument, Plaintiff cites a district court case from the Eastern District of New York, *Johnson v. County of Nassau*, 480 F. Supp. 2d 581 (E.D.N.Y. 2007). In *Johnson*, the plaintiff had filed a previous complaint with the New York State Division of Human Resources ("NYSDHR") alleging race discrimination and unlawful retaliation against him by the Nassau University Medical Center where he was employed. NYSDHR reviewed the evidence and "issued a Determination and Order After Investigation dismissing the Complaint, finding 'no probably cause.'" *Id.* at 592. The *Johnson* court found that Johnson was not barred by res judicata from bringing the lawsuit because he had not been afforded a hearing at the NYSDR and he was not able to engage in discovery.

Even if *Johnson* were binding on the Court, which it is not, the facts are not analogous to the instant case. The NYSDHR is not a court of law. Johnson was not allowed to do discovery because he did not bring a lawsuit in a court of law. There is no indication that he was allowed to file pleadings in response to motions, or to present evidence to a judge. In the instant case, Plaintiff filed a lawsuit in the Pulaski County Circuit Court. He engaged in discovery, made and responded to motions, and had a bench trial before a judge. *Johnson* is not analogous to the instant case. Plaintiff had an opportunity to litigate *Williams I* in good faith. A judge's determination that certain information could

not be obtained by Plaintiff due to Arkansas law does not result in a failure to fully contest the case in good faith.

Plaintiff also claims that there is no identity of claims between the instant case and *Williams I* because (1) there were no federal causes of action presented in *Williams I*, and (2) the federal claims arose after he filed his state court complaint. The claims brought in this action and the claims made in *Williams I* are based upon the same set of facts. Plaintiff was not limited to filing state court claims in state court. He could have filed all of his claims, whether arising under state or federal law, in *Williams I*. "It is well established that claim-splitting is discouraged. All claims must be brought together, and cannot be parsed out to be heard by different courts." *Sparkman Learning Ctr. v. Arkansas Dep't of Human Servs.*, 775 F.3d 993, 1000 (8th Cir. 2014) (citing *Elgin v. Dep't of Treasury*, 567 U.S. 1, 132 S.Ct. 2126, 2147, 183 L.Ed.2d 1 (2012) ("Plaintiffs generally must bring all claims arising out of a common set of facts in a single lawsuit, and federal district courts have discretion to enforce that requirement as necessary to avoid duplicative litigation." (quotations and citations omitted)).

Plaintiff's argument that certain claims arose as a result of filing *Williams I*, or at the time of his medical license revocation in April 2014, is also flawed. In the *Williams I* Complaint, Plaintiff states:

> Plaintiff seeks to have the court enjoin the hearing scheduled to be held in April 2014, as well as injunctive and/or declaratory relief declaring that the Board may not place any further restrictions on Plaintiff's ability to practice medicine, to the extent that such

> restrictions purportedly relate to the issues being raised in this case.
> (*Williams I* Complaint, ECF No. 30-1 at p. 13-14).
>
> * * *
>
> That the Plaintiff have permanent injunctive relief against the Arkansas State Medical Board preventing and precluding the continuation of any conduct or actions taken by the Board in furtherance of the conspiracy being practiced against Plaintiff;
>
> That the Plaintiff have a temporary injunction against the Arkansas State Medical Board requiring the Board to stay its disciplinary proceedings (hearing scheduled for April, 2014) related to the four cases reported by the hospital defendant pending the resolution of this case by this Court.
>
> (*Williams I* Complaint, ECF No. 30-1 at p. 75).

Plaintiff sought to have the April 2014 hearing regarding the revocation of his medical license enjoined. The state court denied Plaintiff's relief. Plaintiff cannot claim that the revocation of his license on April 2014 created a "new" claim that has not been litigated. The specific issue was before the court in *Williams I*. "The doctrine of res judicata would become meaningless if a party could relitigate the same issue ... by merely positing a few additional facts that occurred after the initial suit." *Misischia v. St. John's Mercy Health Sys.*, 457 F.3d 800, 805 (8th Cir. 2006) (quoting *Dubuc v. Green Oak Township*, 312 F.3d 736, 751 (6th Cir. 2002)).

In conclusion, the Court finds that the claims made in Plaintiff's Complaint are barred by res

judicata. The Motion to Dismiss filed by Defendants Baptist, Doug Weeks, Everett Tucker, M.D., Tim Burson, M.D., Scott Marotti, M.D., Susan Keathley, M.D., Christy Cate, M.D., and the Surgical Clinic of Central Arkansas (ECF No. 30) is GRANTED.

IT IS SO ORDERED this 19th day of September, 2017.

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James M. Moody Jr.
United States District Judge

Case No. 18-2423

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

VICTOR B. WILLIAMS, M.D.,
Appellant,

vs.

BAPTIST HEALTH MEDICAL CENTER, et al.,
Appellees.

Appeal from the U.S. District Court
for the Eastern District of Arkansas
Honorable James Moody, District Judge
Case No. 4:17-CV-205-JM

REPLY BRIEF OF APPELLANT

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OTHER AUTHORITIES

I. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE DEFENDANTS KNEW THAT THE ALLEGATIONS AGAINST PLAINTIFF DID NOT CONSTITUTE "UNPROFESSIONAL CONDUCT" AS DEFINED BY *A.C.A. § 17-95-409(a)(2)(G)*

Essentially arguing that they are entitled to judgment because Plaintiff failed to prove that he was not "grossly negligent" and/or that he did not commit "ignorant malpractice," in his Complaint, and/or when responding to the defendants' motion to dismiss and motions for summary judgment, the defendants failed to meet their burden of proof as movants because they failed to point to competent, admissible evidence which would provide a factual basis to support their contention that Plaintiff engaged in unprofessional conduct as defined by A.C.A. § 17-95-409(a)(2)(G). As such, they failed to establish that there is, was, and/or has ever been a factual basis for the revocation of Plaintiff's Arkansas medical license in April 2014. Further, and more importantly, there exists a genuine issue of material fact as to whether there is, was, and/or has ever been a factual basis for the continuous defamatory[1] statements related thereto that have been continuously reported subsequent to the April 2014 Arkansas medical license revocation causing ongoing injury to Plaintiff, notwithstanding the reinstatement of Plaintiff's medical license in December 2015.

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[1] See Miller v. Huron Reg'l Med. Ctr., Inc., 145 F. Supp. 3d 873, 886 (D.S.D. 2015), ("a reasonable jury could conclude that the Adverse Action Report contained false information and that [defendant], acting on behalf of [hospital], was aware of the false information. As such, immunity does not apply here.")

In addition to the absence of a "complaint"[2] by one of the patients who allegedly received the purported negligent medical treatment, the narrative reports of Counce and Mabry fail to meet the evidentiary requirements that would be necessary in order to establish that Plaintiff committed medical negligence generally.[3] Further, and more importantly, they clearly failed to demonstrate that Plaintiff was "grossly negligent" or that he committed "ignorant malpractice" in violation of the Medical Practices Act, *A.C.A. § 17-95-409(a)(2)(G)*.

With respect to allegations of "negligence"[4] in the medical malpractice context, see Neal v. Sparks Reg'l Med. Ctr., 422 S.W.3d 1116, 120-121 ("To establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant breached a standard of care, that damages were sustained, and that the defendant's actions were a proximate cause of those damages. Proximate causation is an essential element for a cause of action in negligence. "Proximate cause" is

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[2] See Complaint, ¶45. App. 33.

[3] See Dodd v. Sparks Regional Medical Center, 204 S.W.3d 579, 583 (Ark. App. 2005), ("'medical injury' or 'injury' means any adverse consequences arising out of or sustained in the course of the professional services being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of services...")

[4] "There is no such thing as 'negligence in the air.' Conduct without relation to others cannot be negligent; it becomes negligent only as it gives rise to an appreciable risk of injury to others. ... In other words, a negligent act is one from which an ordinary prudent person in the actor's position–in the same or similar circumstances – would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner." Hill v. Wilson, 224 S.W.2d 797, 800 (Ark. 1949). (Footnote Omitted.)

defined, for negligence purposes, as that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the *injury*, and without which the result would not have occurred.") (Citations Omitted.) (Emphasis Added.)

While the defendants may argue that it is unnecessary for the Plaintiff's medical treatment to result in "injury" to a patient before the ASMB can take disciplinary action pursuant to *A.C.A. § 17-95-409(a)(2)(G)*, the Arkansas Legislature defined "unprofessional conduct" as being more than mere negligence, but rather, "grossly *negligent* or ignorant *malpractice*," before the Board would be *authorized* to take any disciplinary action, including, but not limited to, revoking a physician's license to practice medicine in Arkansas. See Hollabaugh v. Arkansas State Medical Board, 43 Ark. App. 83, 88 (Ark. App. 1993), ("until there was competent evidence to support [a finding of gross negligence or ignorant malpractice] the board was not authorized to form such an opinion...")

II. THE APRIL, 2014 REVOCATION OF PLAINTIFF'S ARKANSAS MEDICAL LICENSE GAVE RISE TO A SEPARATE, INDEPENDENT FEDERAL CAUSE OF ACTION

The April 2014-revocation of Plaintiff's Arkansas medical license was the overt act that gave rise to a distinct federal cause of action that can not immunized by state law. See Newton v. Etoch, 332 Ark. 325, 334 (1998), ("A § 1983 suit is one brought pursuant to an act of Congress for a deprivation of civil rights against persons operating under color of state law. It establishes a federal cause of action to be enforced in either federal or state courts. As such, it is the supreme

law of the land, and any *state claim of immunity must yield to it.*") (Citations Omitted.) (Emphasis Added.)

The fact that some of the defendants' acts, omissions, and/or conduct may have predated April 2014, does absolve them from liability for the April 2014-revocation of Plaintiff's Arkansas medical license under federal or state law if it can be established that the revocation of was an overt act in furtherance of the ongoing conspiracy to deprive Plaintiff of federal Constitutional due process[5] and/or the conspiracy to retaliate against Plaintiff for claims of racial discrimination against the Baptist defendants that were raised by Plaintiff: (1) during the disciplinary proceedings at Baptist in 2010; (2) in Plaintiff's Complaint filed with ASMB in 2010: and/or (3) in Plaintiff's Complaint filed in *Williams 1* in February 2014.

Obviously Plaintiff's federal cause of action for retaliation for re-filing *Williams 1* in February 2014, necessarily arose subsequent to the filing of the *Williams 1* Complaint filed in February 2014. See Legnani v. Alitalia Linee Aeree Italiane, S.P.A., 400 F.3d 139, 142 (2nd Cir. 2005), ("if, after a first suit is underway, a defendant engages in actionable conduct, a plaintiff may – but is not required to – file a supplemental pleading setting forth defendant's subsequent conduct. A plaintiff's failure to supplement the pleadings of his already commenced lawsuit will not result in a res judicata bar when he alleges defendant's

[5] It is undisputed that at the time that Baptist forwarded the medical records to the ASMB in November, 2010 that were purportedly "peer reviewed" by Counce and Mabry, Plaintiff had not yet exhausted his appeals at Baptist, and therefore had not yet received all of the process that was due to be afforded to him under the Baptist Health medical staff bylaws.

later conduct as a cause of action in a second suit." (Citations Omitted.)

Given that ASMB purportedly possessed Counce and Mabry's narrative reports since the 2010, did not disclose those reports to Plaintiff until June, 2011 after they were disclosed to Baptist during the litigation of *Williams 1*, but did not revoke Plaintiff's Arkansas medical license until after conducting the hearing held in Plaintiff's absence in April 2014, a genuine issue of material fact exists as to whether there was a conspiracy, or "meeting of the minds" between the named defendants that ASMB would help Baptist defend against Plaintiff's racial discrimination claims, to include revoking Plaintiff's Arkansas medical license, if necessary even though the defendants all knew that the medical treatment at issue did not constitute "gross negligence" or "ignorant malpractice," as referenced in *A.C.A. § 17-95-409(a)(2)(G)*.

In their brief, Counce and Mabry argue that, "Dr. Williams appeared before the Board in December 2010, at which time proctoring of his colon surgery cases *was required by the Board on the basis of the reports of Dr. Counce and Dr. Mabry*." Counce and Mabry Appellees' Brief, p.27. When Plaintiff alleged that ASMB required him to obtain a proctor, App. 37 ¶ 53, he did not also allege that the reports of Counce and Mabry were the "bases" for ASMB's requirement. In fact, the record here does not disclose that Plaintiff had obtained Counce and Mabry's reports before the hospital requested the reviews during the *Williams 1* litigation in June, 2011. App. 295.[6]

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[6] App. 295, Footnote 21 states that the reviews were sought by Plaintiff's counsel on June 15, 2010, instead of June 15, 2011, but this is obviously a scrivener's error as ASMB had not began its

Counce and Mabry's argument that their reports were used "as a basis" to "require" Plaintiff to obtain a proctor explains why pursuant to the alleged conspiracy, it was necessary for ASMB to depart from its normal[7] policies and procedures, and obtain the reports prior to Plaintiff's first appearance before ASMB in December, 2010. See Cryer Depo., App. 3997-3998, where she testified about sending Plaintiff's patient medical records to Counce in November 2010, before Plaintiff's first appearance before the Board, and while Plaintiff's was still pursuing the Appellate process at Baptist. In her letter to Counce, Cryer stated, "[y]our review should be sent to us overnight delivery if possible," and that, "[w]e very much appreciate your willingness to work with us to settle this case promptly." Id., at App. 3997. To the extent that the reports were created with the intent to be used by ASMB to "require" Plaintiff to do anything, Counce and Mabry's role may be characterized as "complaining witnesses," as referenced in White v. Frank, 855 F.2d 956, 961 (2nd Cir. 1988), entitling them to only qualified immunity, at best.

In addition, there is a genuine issue of material fact as to whether ASMB's conduct in sending the legal memo to Counce and Mabry along with the medical

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inquiry in June, 2010 and it is undisputed that the medical records were not sent to Counce and Mabry for review until November 2010, at the earliest. App. 36,¶ 52.

[7] Cryer testified that, "our normal process is to give the expert – a expert reviewer, any expert reviewer, plenty of time to do it, to do whatever it is. My only assumption, and this is only an assumption, is that this was on the 12th and we're saying hurry and get them reviewed for whatever reason and have them back here within seven days. That is not normal." App. 3997.

records advising[8] them of ASMB counsel's legal definition of "gross negligence" and "ignorant malpractice" violated *A.C.A. § 25-15- 209(a)*, which requires that, "[u]nless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make final or proposed findings of fact or conclusions of law in any case of adjudication shall not communicate, directly or indirectly, in connection with any issue of fact with any person or party nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate."[9] See also Ethridge v. State, 654 S.W.2d 595, 9 Ark. App. 111, 117-118 (Ark. App. 1983), citing Gramling v. Jennings, 274 Ark. 346, 625 S.W.2d 463 (1981), ("the court reversed because a doctor was allowed to say that, in his opinion, another doctor was not negligent when he severed the plaintiff's ureter... [and that,] in this case it is a bald statement of an opinion as to the ultimate issue.'")

A reasonable fact finder could conclude that ASMB knew that Counce and Mabry's narrative reports were false because on June 16, 2011, ASMB wrote Plaintiff, and requested that he return for an update in one year, implicitly acknowledging that a revocation of Plaintiff's Arkansas medical license was

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[8] See Newton v. Etoch, 332 Ark. 325, 337 (Ark. 1998), citing Burns v. Reed, 500 U.S. 478, 492 (1991) and Imbler v. Pachtman, 424 U.S. at 430, ("prosecutor only had qualified immunity pertaining to the legal advice he gave to police officers . . . because giving advice to investigative officers was not intimately connected with the judicial phase of the criminal process.")

[9] By definition, "malice" is "[a] conscious violation of the law which operates to the prejudice of another person." Fegans v. Norris, 351 Ark. 200, 89 S.W.3d 919, 924-925 (Ark. 2002).

not warranted at that time. App. 38, ¶ 56. In fact, the next day, June 17, 2011, even though they were never ultimately offered into evidence, a representative of the ASMB sent Counce and Mabry's narrative reports to Baptist to be used in *Williams 1*. *App. 38-39, ¶57*. There is no evidence in the record which establish that Plaintiff obtained Counce and Mabry's reports before Baptist did in June 2011, despite Counce and Mabry's unsupported argument in their brief to the contrary. Furthermore, in his June 17, 2011-transmittal letter to Baptist (Harold Simpson), ASMB's representative stated that, "Dr. [Counce] and Mabry do not have to testify or follow-up for further testimony or work concerning these reviews unless they desire to do so." App. 2468.

Other evidence indicating that the defendants had a "meeting of the minds" that Counce and Mabry's reports would be used by Baptist during the *Williams 1* litigation, but would not ever be subject to cross examination is the fact that Plaintiff's properly noticed hearing that was scheduled to be held in June 2012, was postponed after Plaintiff and his witnesses appeared because Counce purportedly was unable to appear to testify. App. 40-41, ¶ 63. Even though the Board knew or should have known that Counce would not attend the hearing on the scheduled date in June 2012, they failed to notify Plaintiff prior to his arrival that the hearing would not go forward due to Counce's absence.

There is a genuine issue of material fact as to whether ASMB failed to go forward with the hearing after seeing the witnesses who appeared along with Plaintiff because they knew that they would not be able to establish that Plaintiff committed "gross negligence" or "ignorant malpractice," either with or without testimony from Counce and Mabry.

In addition, on June 8, 2012, even though ASMB failed to go forward with the properly noticed hearing after Plaintiff appeared along with his witnesses, Hearnsberger publicly humiliated and intimidated Plaintiff in front of all persons in attendance,[10] to include Plaintiff's witnesses and the other ASMB members. See also, App. 207-208, ¶141 of the Complaint filed in *Williams I*, which provides in relevant part that during the June 8, 2012, publicly held Board meeting regarding independent peer written material offered by Plaintiff that supported Plaintiff's treatment of one of the patients at issue, Hearnsberger "stated in a most vocal and argumentative manner that he 'did not believe the peer written material nor Dr. Williams either." As a general surgeon member of ASMB, this statement, along with Hearnsberger's deposition testimony that he did not review the medical records on the four cases,[11] supports Plaintiff's allegations that Hearnsberger intentionally tried to persuade the ASMB members who were not surgeons that Plaintiff was an incompetent physician.

See also, App. 5327, Hearnsberger's June 9, 2012-email to Peggy Cryer directing her to, "Please

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[10] See also Hearnsberger Depo., App. 3539, wherein he admitted that Simpson, who he had known for a long time, had been in attendance as a representative of Baptist, and "just wanted to hear the discussion." See also App. 42, ¶ 66. On June 18, 2012, "a representative of the Baptist Health Defendants attempted to coerce Plaintiff into voluntarily dismissing his cause of action, and stated to counsel for Plaintiff, (in the presence of Plaintiff) that if he didn't dismiss his lawsuit, Plaintiff would have to either 'admit that he had done something wrong to the Arkansas State Medical Board, or lose his medical license.'"

[11] Hearnsberger also conceded during his deposition taken in the federal action that the four cases were complicated surgical cases. App. 3544, Depo., pg. 58.

pass this on to the other board and to Bill [Trice]," stating that one of Plaintiff's professors had described him as "'hard headed' and a 'poor resident.'" This statement is/was false, as Plaintiff's student file at the University of Arkansas contains a favorable written evaluation from Dr. Eidt covering the entire time period that Plaintiff was a resident under Eidt at the University of Arkansas. App. 42, FN15.

Therefore, there is a genuine issue of material fact as to whether Hearnsberger's conduct in this regard was done with the specific intent to convince the other ASMB members who were not surgeons to vote to require Plaintiff to attend a physician assessment program before Plaintiff could have his medical license renewed because he knew that Plaintiff would likely prevail at a hearing with the expert witnesses who appeared along with him to testify on his behalf.

Additional facts further supporting this argument are as follows: (1) ASMB rejected Plaintiff's successful completion of the KSTAR physician assessment program; (2) after Plaintiff successfully completed the KSTAR physician assessment program, ASMB attempted to have KSTAR reconsider its assessment; and (3) ASMB sent a copy of Plaintiff's state court civil rights complaint to KSTAR instead of the medical records related to the four patients whose medical treatment was purportedly at issue.

There is a genuine issue of material fact as to whether ASMB also intentionally deprived Plaintiff of the ability to cross-examine Counce and Mabry by holding the hearing in April 2014, when the ASMB knew beforehand that Plaintiff would not attend because he had no knowledge that the hearing would be taking place at that date and time. If done intentionally, this was another conscious violation of Plaintiff's

Arkansas statutory right to notice and opportunity to be heard before the revocation of his medical license giving rise to the federal constitutional claims raised in Plaintiff's federal action.

See Osuagwu v. Gila Reg'l Med. Ctr., 850 F. Supp. 2d 1216, 1235 (D.N.M. 2012), ("[b]y failing to bring to Plaintiff's disciplinary hearing the PRC physician-reviewers who expressed their opinions that Plaintiff's performance fell below the standard of care, and by failing to bring in the other physicians who allegedly informed the MEC and PRC members that Plaintiff had committed errors failing to consult, Gila Regional and its MEC deprived Plaintiff of an opportunity to cross-examine the witnesses against him. As a matter of law, this failure violated Plaintiff's rights[12] of cross-examination under both the Bylaws and the minimum standards of constitutional due process.")

Therefore, the April 2014-hearing that was intentionally held in Plaintiff's absence[13] and the revocation of Plaintiff's Arkansas medical license is the overt[14] act in furtherance of the conspiracy to cause injury to Plaintiff which gave rise to Plaintiff's federal

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[12] The plaintiff is "required to prove a deprivation of a constitutional right or privilege in order to prevail on a § 1983 civil conspiracy claim." White v. McKinley, 519 F.3d 806, 814 (8th Cir. 2008).

[13] A.C.A. § 17-95-410(c)(2), requires that the Board send "by registered mail to the person's last known address of record a copy of the order and notice of hearing along with a written notice of the time and place of the hearing." App. 47, ¶ 82, FN18.

[14] An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff." Varner v. Peterson Farms, 371 F. 3d 1011, 1019 (8th Cir. 2004).

cause of action that was filed in district court on March 31, 2017.

Moreover, to the extent that a genuine issue of material fact exists as to whether the Baptist defendants intentionally and prematurely[15] invoked the aid of ASMB, (to include Counce and Mabry) in the first instance, in order to defend against Plaintiff's racial discrimination claims in *Williams 1*, and/or to otherwise cause injury to Plaintiff in retaliation for filing *Williams 1*, they too may be subject to liability under *§ 1983* for damages arising from the improper revocation of Plaintiff's Arkansas medical license.

"Although *§ 1983* can only be used to remedy a deprivation of rights done under the color of law, a private actor can be liable 'under *§ 1983* for conspiring with state officials to violate a private citizen's rights. The key inquiry is whether the private party was a willful participant in the corrupt conspiracy." White v. McKinley, 519 F.3d at 815-816. See also Greenwood v. Ross, 778 F.2d 448, 456 (8th Cir. 1985), ("Claims of retaliatory discharge based on the *first amendment* are commonly asserted in *§ 1983* actions.")

Similarly, Plaintiff's retaliation claim is also viable under *§ 1981* and "[a]n individual who establishes a cause of action under *§ 1981* is entitled to both

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[15] See Osuagwu v. Gila Reg'l Med. Ctr., 850 F. Supp. 2d 1216, 1220 (D. N. M. 2012), ("Under HCQIA, any health-care entity that ***takes final peer-review action*** that adversely affects a physician's hospital privileges for a period longer than thirty days must report that final action to the state board of medical examiners. See *42 U.S.C.A. § 11133(a)(1)*. The board of medical examiners must then report this information to the National Practitioner Data Bank. *See 45 C.F.R. § 60.11(b).*") Here, in addition to eliciting the aid of ASMB prior to Plaintiff's exhaustion of the appeals authorized by the Baptist medical staff bylaws, Baptist submitted a NPDB report in June, 2010 before making a final decision in April 2011.

equitable and legal relief, including compensatory and, under certain circumstances, punitive damages," entitling both parties to "the right to a jury trial on the legal claims." Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316, 318 (8th Cir. 1981).

The damages sought by Plaintiff in his federal cause of action are not barred by the doctrine of res judicata because they did not arise until after he filed his Complaint in *Williams 1*. Indeed, by intentionally going forward with the hearing in Plaintiff's absence, a genuine issue of material facts exists as to whether they did so with the intent to preclude Plaintiff from being able to raise his federal constitutional claims in his state court case (*Williams 1*). See Sparkman Learning Ctr. v. Ark. Dep't of Human Servs., 775 F.3d 993, 1000 (8th Cir. 2014), ("Based on the Hamilton rule, constitutional claims must be raised at the administrative level to preserve such claims for appeal before the state courts.") To the extent ASMB intentionally held the hearing in Plaintiff's absence for this reason as well, it deprived Plaintiff of his fundamental right to access of the courts, which further supports Plaintiff's retaliation cause of action filed in federal court. See Harrison v. Springdale Water & Sewer Com., 780 F.2d 1422, 1427- 1428 (8th Cir. 1986), ("An individual's constitutional right of access to the courts cannot be impaired, either directly or indirectly...")

Plaintiff did not seek compensatory damages[16] from ASMB in *Williams 1*. At the time that Plaintiff

[16] See also Arkansas State Medical Board v. Cryer, 521 S.W.3d 459, 463 (Ark. 2017), ("[b]ecause a judgment for Byers would operate to control the action of the State or subject it to liability, here ACRA claims against the Board and against Cryer in her official capacity are barred by article 5, section 20 of the Arkansas Constitution.")

filed the *Williams 1* complaint in state court on February 25, 2014, the claims alleged in Plaintiff's federal cause of action had not yet accrued[17] because: ASMB had entered no orders[18] against him; ASMB had not reported any adverse actions against Plaintiff to the National Practitioner Data Bank ("NPDB"); and ASMB had not otherwise taken any adverse actions against Plaintiff that would have required and/or allowed Plaintiff to seek further injunctive relief and/or compensatory damages.

Further, the Consent Order entered into by Plaintiff and ASMB in 2015, failed to expressly resolve any of the issues involved in this federal action and therefore has no preclusive effect on the federal claims raised herein. See Barzilay v. Barzilay, 600 F.3d 912, 920 (8th Cir. 2010), ("Because it did not actually determine the relevant issues, the consent judgment would have no preclusive effect in these proceedings.")

Indeed, regarding the only issues that may be relevant in this case, it is undisputed that, "[t]he parties have all agreed that the four (4) cases that were

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[17] "[T]he accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law." Wallace v. Kato, 549 U.S. 384, 387 (2007).

[18] See Baber v. Ark. State Med. Bd., 2010 Ark. 243, 368 S.W.3D 897, 901, ("'Adjudication' is defined as an 'agency process for the formulation of an order.' ... '***Order*** is defined as the 'final disposition of any agency in any matter other than rule making, including licensing [], in which the agency is required by law to make its determination after notice and hearing.") App. 5528, June 20, 2012-email from Juli Carlson to Kate Seippel, of USCD PACE Program, ("I just spoke with a staff member at your facility who advised me to email you to let you know we have a licensee, Victor Williams, ***that the Board has ordered to undergo an assessment at your facility*** prior to being allowed to continue performing surgical procedures in Arkansas.") (Emphasis Added.)

reviewed by the Board and subject to the April 3, 2014-hearing, will be remanded to the Board for possible disciplinary action in the future," and ASMB "agrees to not proceed on those cases with any disciplinary action regarding those cases until Dr. Williams' case against the remaining defendants in [ ] Pulaski County Circuit Court Case No. 60CV-14-808, is concluded." App. 3450, ¶ 3. It is also undisputed that on June 4, 2015, the "Board further agreed to *rescind and void the 2014 revocation* of Dr. Williams' Arkansas medical license and return his licensure status to that prior to the hearing due to a lack of notice." App. 5353.

The Consent Order's requirement that ASMB not proceed with any disciplinary action regarding the four (4) cases at issue until Plaintiff's state court case is concluded is consistent with the injunctive relief sought by Plaintiff when adding ASMB as a defendant when he re-filed the *Williams 1* Complaint in February 2014.

This relief is also consistent with the district court's holding in Walker v. Mem'l Health Sys., 231 F. Supp. 3d 210 (E.D. Texas 2017).[19] In Walker, the district court found that, "[a]n adverse report on the NPDB that deems a surgeon to have 'substandard or inadequate skill' is intrinsically harmful to that surgeon's practice, professional reputation, and livelihood," and that, "[a]n erroneously filed report

[19] In Walker, the district court ordered the hospital, "and anyone acting on its behalf to immediately submit to the National Practitioners Data Bank a Void Report regarding Dr. Walker, and all such entities and persons shall refrain from filing any other statements or reports with the National Practitioners Data Bank relating to the actions the Hospital has taken against Dr. Walker in connection with the peer review process that is the subject of this lawsuit, including the imposition of a proctoring requirement, during the pendency of this suit." Walker, *supra*, at 217.

announcing to all interested parties that a physician has been sanctioned, suspended, or lacks the adequate skill to practice medicine carries with it the potential to immediately and irrevocably harm that physician and his practice. This stigma and reputational harm poses a substantial threat to [the physician's] ability to gain or maintain employment to support his practice." Id., at 216.

The state court's failure to address NPDB reports and/or to otherwise order that such reports be voided, does not preclude this court from exercising jurisdiction over Plaintiff's federal cause of action seeking damages arising from ASMB's improper revocation of Plaintiff's Arkansas medical license, to include the false NPDB reports related thereto, particularly since the Consent Order provided that Plaintiff would be placed in the position he was "as if the hearing didn't happen,"[20] and no such negative reports had been submitted to NPDB, or otherwise publicly reported by ASMB prior to the April, 2014-hearing. App. 4214. See also, App. 5353.

Under Arkansas law, Plaintiff had a right to seek

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[20] Plaintiff's federal cause of action (Equal Protection) against the defendants also relate to the Arkansas State Medical Board's failure to afford Plaintiff the opportunity to prosecute his civil action against the Baptist defendants consistent with the Board's customary, normal policies and procedures that are enjoyed by other physicians. See also Winegar v. Des Moines Indep. Community Sch. Dist., 20 F.3d 895, 899 (8th Cir. 1994), ("A property interest in employment can also be created by implied contract, arising out of customs, practices, and de facto policies. When such a property interest exists, the employee is entitled to a hearing or some related form of due process before being deprived of the interest.") (Citations Omitted.)

injunctive[21] and/or declaratory relief in *Williams 1* prior to a hearing due to ASMB's rejection of his successful completion of the KSTAR physician assessment program and ASMB's threat to still go forward with a hearing unless Plaintiff agreed to attend another physician assessment program. See Beavers v. Arkansas State Board of Dental Exam'rs, 151 F.3d 838, 840 (8th Cir. 1998) ("The AAPA permits persons who allege injury or threat of injury to their person, business, or property, by any rule or its threatened application, to seek declaratory judgment of the validity or applicability of that rule in the circuit courts of Arkansas. Ark. Code Ann. § 25-15-207.")

Plaintiff's federal cause of action against the named defendants in their individual capacities is premised upon their individual conduct, acts, and/or omissions as they relate to the damages suffered by Plaintiff as a result of the revocation of his Arkansas medical license, as well ASMB's subsequent failure to accurately report the voiding of the revocation of his medical license from the time that it was entered in 2015 to the present, as there are genuine issues of material fact as to whether the license revocation occurred not in furtherance of quality healthcare but in retaliation for the filing of *Williams 1*.

"The United States Supreme Court has stated that 'the right of access to the courts is indeed but one aspect of the right of petition.' The Court has noted that the right to petition is 'among the most precious of the

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[21] The injunctive relief sought by Plaintiff in Williams 1, became moot when the parties entered into the Consent Order. See Toan v. Falbo, 268 Ark. 337, 595 S.W.2d 936, 937 (Ark. 1980), ("We have recognized that equity has jurisdiction to enjoin or restrain officers of state agencies from acts which are ultra vires or beyond the scope of their authority.")

liberties safeguarded by the Bill of Rights, and that it has 'a sanctity and a sanction not permitting dubious intrusions.' As an aspect of the *First Amendment* right to petition, the right of access to the courts shares this 'preferred place' in our hierarchy of constitutional freedoms and values. ... The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future." Harrison v. Springdale Water & Sewer Com., 780 F.2d 1422, 1425-1426 (8th Cir. 1985). (Citations Omitted.)

ASMB also intentionally failed to consider and/or to present during the April 3, 2014-hearing, exculpatory evidence that had been previously provided to the Board prior to Plaintiff's June 2012, appearance before the Board, when he appeared as scheduled, along with the witnesses who were prepared to give sworn testimony in support of their expert reports. See App. 40-41, ¶s 63 & 64. Contrary to the reports of Counce and Mabry, Professor Rhonda Tillman, M.D., had prepared written experts opinions wherein she opined that the medical treatment provided by Plaintiff met the applicable standard of care. App. 888-894. In addition to Dr. Tillman's reports, Plaintiff had also submitted the reports of Hamid Mumtaz, M.D., another physician on the medical staff at Baptist, who also opined that the medical treatment rendered by Plaintiff had met the applicable standard of care. App. 895-896. These reports had been read by defendants Beck and Hearnsberger before Plaintiff's Arkansas medical license was revoked, but were never considered by the other Arkansas State Medical Board members because

they were not placed into evidence during the hearing held in April, 2014. App. 3826-3827; App. 3635, 3679, 3684-3689; and App. 4857-4859.

"Where reliance is placed by an administrative agency upon testimony of certain witnesses in making a critical factual determination, it will be an abuse of discretion to fail to hear material evidence which might impeach, not only the testimony, but the findings made by the agency as well." Arkansas State Bd. of Nursing v. Long, 651 S.W.2d 109, 113, 8 Ark. App. 288, 296 (Ark. App. 1983).

III. THE DEFENDANTS ARE LIABLE FOR PLAINTIFF'S STATE LAW CLAIMS ARISING FROM THE 2014 LICENSE REVOCATION

Because they are related to, elements of, and/or inextricably intertwined with Plaintiff's federal claims alleged in the Complaint filed in federal court, Plaintiff's state law claims for abuse of process and tortious interference also accrued in April 2014, with the "overt act" of the revocation of Plaintiff's Arkansas medical license.

In their brief, the Baptist defendants argue that, "Dr. Williams argues that an abuse of process and a tortious interference occurred when his medical license was revoked in April 2014. He theorizes that his medical license was revoked in order to coerce[22] him to

[22] "Abuse of process is somewhat in the nature of extortion or coercion." Harmon v. Carco Carriage Corp., 320 Ark. 322, 327 (Ark. 1995). "The key to this tort is the improper use of process after issuance to accomplish an ulterior purpose for which the process was not designed. It is the purpose for which the process is used, once issued, that is of importance." Id., at 327. (Citations Omitted.)

drop his civil lawsuit against the ASMB[23] and the Baptist Health Appellees that was pending at that time." *Baptist Appellees' Brief*, pp. 35-36. (Footnotes Added.)

Under Arkansas law, "[a] conspiracy may be shown by direct evidence of an actual agreement or understanding between conspirators, but it may also be shown by circumstantial evidence. It may also be inferred from actions of alleged conspirators, if it be shown that they pursued the same unlawful object, each doing a part, so that their acts, although apparently independent, are in fact connected and cooperative, indicating a closeness of personal association and a concurrence of sentiment. Any act done or declaration made by one of the conspirators in furtherance, aid or perpetration of the alleged conspiracy may be shown as evidence against his fellow conspirators." Mason v. Funderburk, 446 S.W.2d 543, 548, 247 Ark. 521, 529 (Ark. 1969). (Citations Omitted.) In Mason, the Arkansas Supreme Court held that, "[e]ven though one may not be liable as a direct actor in interfering with existing contracts of employment, he may incur liability as a participant in a conspiracy which results in one or more overt acts by others constituting actionable interference." Id., at 529.

The April 2014-revocation of Plaintiff's Arkansas medical license is the over act which caused the

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[23] Compare Counce and Mabry's brief where they argue that, "Dr. Williams has included Dr. Counce and Dr. Mabry in his alleged state court claims, although there are no allegations in Dr. Williams' Complaint as to the nature of any state claim against either or facts which would support such allegations." *Appellees Counce and Mabry's Br.*, p. 25. Obviously, Plaintiff's medical license could not have been revoked without Counce and Mabry's participation in the hearing held in Plaintiff's absence.

damages[24] that are being sought in Plaintiff's federal cause of action. Specifically, the continuous NPDB reports, which state that Plaintiff committed, "gross negligence," or "ignorant malpractice" are defamatory and continue to be reported despite the state court's order directing the parties to: (1) void and rescind the order revoking Plaintiff's Arkansas license; (2) to reinstate Plaintiff's Arkansas medical license; (3) remand the four cases to ASMB for possible disciplinary action in the future after Plaintiff's state law claims are disposed of; and (4) to treat the April 2014-hearing as if it did not happen.

Obviously, since there had been no such negative reports issued before the April 2014-hearing, ASMB is not treating Plaintiff as if the hearing did not happen. In addition, while all of the defendants argue that they are not responsible for the NPDB reports, they participated in the underlying conduct that led to the false information contained in the reports that have been filed and/or that continue to be filed.

In Mason v. Funderburk, the Arkansas Supreme Court held that, "[d]efamatory statements and false statements have been recognized as improper actions giving rise to a cause of action for interference with contractual relations. We have held that words, written and published, prejudicing one in his employment, are actionable. The fact that the language alleged to have induced a discharge of an employee might be set forth in the complaint in such a manner as to form the basis of an action for libel or slander does not prevent the employee from maintaining an action for wrongful

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[24] See Mason, *supra*, at 529, ("Such a conspiracy is not actionable in and of itself, but recovery may be had for *damages* caused by acts committed pursuant to the conspiracy.") (Emphasis Added.)

interference with his contract of employment." Id., at 530. (Citations Omitted.)

In addition to going forward with the hearing so that Plaintiff could not cross examine Counce and Mabry, there also is a genuine issue of material fact as to whether the defendants knew that Plaintiff would prevail at a hearing, but went forward with the April hearing in Plaintiff's absence so that they could continuously submit false reports about Plaintiff's competence to the NPDB in order to cause Plaintiff to suffer "the harshest penalty possible," (i.e., to continuously tortiously interfere with Plaintiff's existing and potential contractual and business relationships with his patients, insurers, and other hospitals).

"Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but missing or misapplying process justified in itself for an end other than that which it was designed to accomplish. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor." Lewis v. Burdine, 240 Ark. 821, 824 (Ark. 1966).

Conclusion

In light of the forgoing, the district court's orders granting the defendants' motions to dismiss and motions for summary judgment should be reversed.

Respectfully submitted, this 13th day of December, 2018.

By: s/s Eric E. Wyatt, Esq.

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Case No. 18-2423

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VICTOR B. WILLIAMS, M.D.,
Appellant,
vs.
BAPTIST HEALTH MEDICAL CENTER, et al.,
Appellees.

Appeal from the U.S. District Court
for the Eastern District of Arkansas
Honorable James Moody, District Judge
Case No. 4:17-CV-205-JM

BRIEF OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

Summary of the Case and Waiver of Oral Argument

Victor B. Williams, M.D.'s unrestricted surgical medical staff privileges at Baptist Health Medical Center (hereinafter, "Baptist") were terminated in April 2011. Williams filed suit against Baptist in April, 2011, in Pulaski Circuit Court, relying upon the Arkansas Civil Rights Act and Arkansas state law. When he refiled his lawsuit in February, 2014 after having obtained a nonsuit in March, 2013, Williams also sought injunctive relief against the Arkansas State Medical Board (hereinafter, "Medical Board"), and one of its members who had previously served as a member of the surgical control committee at Baptist, and who became a member of the Medical Board in June 2009. After being served with the re-filed *Complaint* in March 2014, but before filing its *Answer*, the Medical Board held a hearing in April 2014, and revoked Williams's Arkansas medical license in his absence. Williams filed suit in federal court on March 31, 2017 seeking damages related to the revocation of his Arkansas medical license.

Appellant does not request oral argument, but will attend if the Court finds that oral argument would be helpful and/or necessary for the Court to adequately decide the issues raised on appeal.

Corporate Disclosure Statement

Appellant, Victor Williams, M.D., brought this action as an individual.

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Jurisdictional Statement

This is an appeal from a final order and judgment of the U.S. District Court for the Eastern District of Arkansas in an action brought pursuant to *42 U.S.C. §§ 1981* and *1983*. The district court had original jurisdiction over the federal claims under *28 U.S.C. §§ 1331* and *1343*. The district court had supplemental jurisdiction over the state law claims raised in the Complaint pursuant to *28 U.S.C. § 1367*.

The district court entered its final order and judgment on May 31, 2018. (APP. 5305, 5309). (Appellant's Appendix ("APP.")). On June 29, 2018, Appellant timely filed his Notice of Appeal. (APP. 5310) Therefore, this Court has appellate jurisdiction over this appeal under *28 U.S.C. § 1291*.

Statement of the Issues

A. Whether the district court erred in granting the Baptist Defendants' motion to dismiss in its September 19, 2017 Order. (APP. 1053)

B. Whether the district court erred in granting the motions for summary judgment filed by defendants Counce and Mabry in its March 8, 2018 Order. (APP. 3394)
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C. Whether the district court erred in granting the motions for summary judgment filed by defendants Beck and Hearnsberger in its May 31, 2018 Order. (APP. 5305)
Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985)

D. Whether the District Court Erred in Denying Plaintiff's Motion to Amend the September 19, 2017 Order Granting the Baptist Defendants' Motion to Dismiss in its November 1, 2017 Order. (APP. 1471)

Statement of the Case

On November 25, 2003, Plaintiff was first granted medical staff privileges at Baptist Health Medical Center, Little Rock, for a two-year time period. Complaint ¶20, (APP. 21). At this time, Plaintiff was the only African-American surgeon in Little Rock, Arkansas area who provided both the range and the type of surgeries to patients in the areas of general, cardiac, thoracic and vascular surgery. *Id.*

On September 26, 2005, Plaintiff submitted his first application for reappointment of his medical staff privileges at Baptist, and on February 27, 2006, his application for reappointment was granted for another two-year period. Complaint ¶21 (APP. 21-22). On March 20, 2008, Plaintiff's second application was granted for an additional two years. *Id.*, at 22.

In November 2008, Plaintiff purchased a parcel of real property located at 9712 W. Markham St., Little Rock Arkansas for the purpose of constructing a medical office to provide medical treatment for his surgical patients. *Id.* In June 2009, defendant Hearnsberger was appointed to become a member of the Arkansas State Medical Board. Hearnsberger Depo. (APP. 3531). In the fall of 2009, Plaintiff completed the build out process for his new medical office, and began advertising the same to inform patients, both current and potential, that he would

begin servicing and treating patients there. Complaint ¶25. (APP. 22).

On November 3, 2009, Plaintiff submitted his third application for reappointment of his medical staff privileges at Baptist. *Id.* At the time that he submitted his third application for reappointment, Plaintiff had never had any adverse actions taken against him regarding any medical treatment that he had provided. Complaint ¶28. (APP. 22-23). According to reports generated during Plaintiff's 2009 credentialing re-application process, it was documented that during the one year "look back" period September 1, 2008, through August 31, 2009, Plaintiff had performed more than 550 surgical procedures at Baptist. Complaint ¶29. (APP. 24). As Chief of the Department of Surgery, Defendant Burson became aware of the number of surgical procedures that had been performed by Plaintiff when Burson approved[1] Plaintiff's recredentialing application packet in January 2010. Complaint ¶29. (APP. 24).[*]

On February 5, 2010, defendants Weeks and Burson met with Plaintiff and attempted to coerce Plaintiff into voluntarily resigning his medical staff privileges because they knew that there was no sufficient basis to deny his pending application for re-credentialing for another two years. Complaint ¶30.

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[1] On January 18, 2010, Burson executed a document approving Plaintiff's re-credentialing application and attested that, "I have reviewed this Application for Reappointment and supporting documentation. I have knowledge of this applicant's clinical judgment and technical skills, and I believe this applicant is currently competent to perform the clinical privileges requested, including clinical privileges for performing high-risk conditions. This applicant has adhered to the requirements of the Professional Staff Bylaws and rules of the hospital."

[*] See Keathley Depo., (APP. 5066); Complaint ¶ 33 (APP. 27)

(APP. 24). Plaintiff refused to voluntarily resign his medical staff privileges. Complaint ¶31, (APP. 25).

On April 1, 2010, Plaintiff was informed him that his reappointment application to the Baptist Health Professional Staff had been approved for an additional (fourth) two year period effective March 2010 through March 2012. Complaint ¶39. (APP. 30). A few days later, on April 21, 2010, Plaintiff's medical staff privileges at Baptist were terminated rendering him unable to continue to provide medical services at Baptist from that date forward. Complaint ¶42. (APP. 31). Plaintiff immediately pursued the appeal process authorized by the Baptist medical staff bylaws, as Plaintiff, through counsel, filed a notice of appeal of the decision to terminate his medical staff privileges on May 25, 2010, and also included in the notice Plaintiff's belief that "the actions taken against him were 'racially biased and discriminatory." Complaint ¶s44, 46. (APP. 32-33).

At the time that Plaintiff's medical staff privileges were terminated in April 2010, there had not been a complaint filed with the Arkansas State Medical Board against Plaintiff by any patient and/or person related to the four medical cases at issue. Complaint ¶45 (APP. 33). The customary practice at the Arkansas State Medical Board is to promptly give the physician notice and the opportunity to respond to any complaints immediately after they are received. See Cryer Depo. (APP 3916-3917, 3940, 3947, 4014).

At some time on or before October 19, 2010, employees, agents and/or representatives of the Arkansas State Medical Board had obtained copies of the medical records of the four patients at issue during the appellate process at Baptist Hospital related to the termination and/or revocation of Plaintiffs medical staff

privileges. Complaint ¶46. (APP. 447). When the Medical Board first obtained the medical records of the patients that were used by Baptist hospital to terminate Plaintiffs medical staff privileges, Plaintiff had not yet exhausted the appeal rights that he had available at Baptist Hospital pursuant to the medical staff bylaws. *Id.*

The Medical Board's policy and customary practice had always been to await the outcome of any appeals and/or litigation related to medical treatment provided by a physician prior to any formal action being taken by the Board. See Hearnsberger 2014 Depo. (APP. 3714-3716); Beck 2014 Depo. (APP 4808), ("whenever there is an issue with a physician before the Board and there's ongoing litigation, in an attempt to be as fair as possible we like that litigation to be completed or brought to a close before the Board takes any kind of action.")

In the transmittal letter sent to one of the medical record reviewers (Counce) on November 12, 2010, before Plaintiff's first appearance before the Board, Peggy Cryer, the Board's Executive Secretary, requested that the reviews be provided to the Board before November 19, 2010, in time for the December Board meeting, and that, "we very much appreciate your willingness to work with us to settle this case promptly." Cryer Depo. (APP. 3997-3998). Cryer did not have any authority with respect to physician disciplinary matters, absent specific directions from the Board. Cryer Depo. (APP. 3972-3974, 3993-3995); Beck Depo. (APP. 4786-4789; 4803-4804).

As a result of Plaintiff's first appearance before the Medical Board in December 2010 he agreed to get a proctor for all colon surgery cases that he would perform in the future even though there had never

been a hearing noticed against him or any findings[2] made that he had violated the Arkansas Medical Practices Act. Complaint ¶53. (APP. 37).

Immediately after he exhausted the appellate process at Baptist, on April, 12, 2011, Plaintiff filed *Civil Action No. 60CV-11-l 990* in Pulaski County Circuit Court against Baptist, and others alleging, among other things, that he had been discriminated against because of his race, Black, in violation of the Arkansas Civil Rights Act of 1993. Complaint ¶54. (APP. 37).

On October 3, 2011, Dr. Gilbert[3] submitted a report to the Medical Board which stated in relevant part as follows:

> **I have served as a proctor for Dr. Victor Williams since December 2010. I have proctored him during performance of abdominal colon operations as well as other surgical procedures at his request. I have discussed the cases with him prior to surgical interventions and in the postoperative periods. His knowledge base is proficient in the areas of general surgery, and I have found his technical abilities to be proficient as well. I have no concerns regarding his judgment or surgical technique. He has handled**

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[2] See the *Medical Practices Act, A.C.A. § 17-95-410(e)(1)*, "At the conclusion of the hearing, the board shall first decide whether the accused is guilty of the charges against him or her and then decide on appropriate disciplinary action."

[3] Dr. Carl Gilbert is a Black (African American) board certified general surgeon that who had served as Plaintiff's proctor for colon cases based on his agreement with the Medical Board. Beck 2014 Depo., (APP. 4882-4883, 4892-4893, 4921-4922).

> **patients with multiple complex medical issues well.**
> **In summary, his preoperative and postoperative judgment is appropriate and his technical skills are proficient and within the standard of care. For any questions please do not hesitate to contact me.**

Complaint ¶59. (APP. 39-40).

On December 1, 2011, the Arkansas State Medical Board voted to Notice Plaintiff for a disciplinary hearing, even though they had told him previously on June 16, 2011 to "Return in one (1) year for an update (June 2012)," and even though there were no other acts and/or omissions committed by Plaintiff subsequent to June 2011 that would constitute an alleged violation of the Arkansas Medical Practices Act, i.e., "gross negligence or ignorant malpractice." Complaint ¶62. (APP. 40)

On June 8, 2012, Plaintiff appeared at the Arkansas State Medical Board for a scheduled hearing, along with counsel, and several witnesses who were going to testify on his behalf but the Board voted to postpone the hearing purportedly because Counce could not attend. Complaint ¶63. (APP. 40). Hearnsberger 2014 Depo. (APP. 3728)

One of the witnesses who appeared with Plaintiff was Dr. Rhonda Tillman, who was a professor of surgery at the University of Arkansas. Tillman had already given written expert opinions[4] wherein she

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[4] In addition to acknowledging that she is a professor at the University of Arkansas Medical School, the defendants who knew Dr. Tillman all testified that she has a reputation as a competent

opined that Plaintiff had not deviated from the applicable standard of care during the disciplinary proceedings held against him at Baptist Health. *Complaint*, ¶64. (APP. 41).

In addition to postponing the scheduled hearing after Plaintiff had arrived with witnesses prepared to testify on his behalf, on June 8, 2012, the Board requested that Plaintiff cease to perform any surgical procedures at all until he completed a physician assessment program and submit the results to the Board. *Complaint*, ¶63. (APP. 40-41).

In December 2012 Plaintiff was recertified by the Board of Surgery with his recertification set to expire in July 2023. *Complaint*, ¶70., (APP. 43). In February 2013, Plaintiff notified the Arkansas State Medical Board about his recertification and requested that the same be considered in lieu of him having to complete a physician assessment program in order to renew his medical license. *Complaint*, ¶71. (APP. 43). On August 1, 2013, the Arkansas State Medical Board voted to proceed with a disciplinary hearing against Plaintiff in October 2013 unless Plaintiff successfully completed a physician assessment program. *Complaint*, ¶74. (APP. 44).

On August 2, 2013, Plaintiff applied to attend the KSTAR Physician Assessment Program at Texas A&M

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general surgeon. Hearnsberger 2014 Depo., (APP. 3635). Beck 2014 Depo., (APP. 4924). Yet, Beck and Hearnsberger determined that Tilman's reviews carried less weight than Counce and Mabry's. Hearnsberger 2014 Depo., (APP. 3635, 3679, 3684-3689). Beck 2014 Depo., (APP. 4857-4858, 4922-4924). Further, Board member Betton, who testified that Tillman has a "very good reputation," stated that he never saw her reviews and that they were not admitted during the April, 2014 hearing. Betton Depo., (APP. 3827, 3877-3878).

University Health Science Center. *Complaint*, ¶ 75. (APP. 44). He paid a total amount of $13,000.00 in costs and fees for the assessment. *Id.* He successfully completed the testing dates on September 5-6, 2013, and the KSTAR Meeting and Determinations on September 30, 2013. *Id.* The Final Report was prepared on October 9, 2013, and the surgeon who interviewed Plaintiff during his assessment indicated that he would not place any restrictions on Plaintiffs ability to continue surgical practice. *Id.*

On December 23, 2013, the Board, through counsel, wrote the Medical Director of the KSTAR program and provided certain information for his consideration, to include, "a copy of a lawsuit that was filed involving Baptist Medical Center, Little Rock, and Dr. Williams."[5] *Complaint*, ¶ 77. (APP. 45) Notably absent from the materials submitted by the Board to KSTAR was any information related to the surgical cases at issue. *Id.* According to the correspondence from the Board, it was furnishing the supplemental information to KSTAR "in the hopes that it would give, ... a more complete picture of what has happened with Dr. Williams." *Id.*

On February 25, 2014, Plaintiff re-filed his action against Baptist Health Medical Center in Pulaski County Circuit Court, Civil Action No. 60CV-14-808, and added the Arkansas State Medical Board as a

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[5] When Plaintiff attended the KSTAR program and when the Board sent a copy of his Civil Rights Complaint to KSTAR officials, his lawsuit was no longer pending. On March 5, 2013, upon consideration of *Plaintiff's Motion to Voluntary Non-Suit* his cause of action as a matter of right, the trial court in *Civil Action No. 60CV-11-1990* entered an *Order of Voluntary Dismissal*, and dismissed Plaintiffs cause of action without prejudice to re-file, in accordance with Ark. R. Civ. P. 41. *Complaint*, ¶72. (APP. 44).

named defendant because the Board failed to accept his successful completion of the KST AR program, and in light of the other facts and circumstances surrounding the way he had been treated by the Arkansas Medical Board since October 2010,[6] even though there had been no hearing held and no finding made by the Board that Plaintiff had violated the Arkansas Medical Practices Act. *Complaint*, ¶78. (APP. 45).

The Arkansas State Medical Board was served with the timely re-filed lawsuit (*Civil Action No. 60CV-14- 808*) that was filed by Plaintiff on February 25, 2014, by personal service on Beck, Chairman of the Arkansas State Medical Board on March 7, 2014. *Complaint*, ¶80. (APP. 46). *Civil Action No. 60CV-14- 808* sought to have the trial court enjoin any further proceedings against Plaintiff by the Board until the final disposition of his claims against Baptist in accordance with the Board's customary policies and procedures. *Complaint*, ¶s 48, 80. (APP. 34-35, 46-47).

Notwithstanding Plaintiff's request for injunctive relief in *Civil Action No. 60CV-14-808*, and without providing Plaintiff with prior notice as required by *A.C.A. § 17-95-410(c)(2)*, the Board went forward with a hearing in Plaintiffs absence and revoked his medical license in April 2014. *Complaint*, ¶s 81-83. (APP. 47-48).

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[6] Based upon agreements entered into by the parties and/or "orders entered by the Board" during his appearances before the Board, he only performed certain surgical procedures with a proctor from December 2010 through December 2011 and he ceased to perform any surgical procedures after his June 8, 2012, appearance before the Board. *Complaint*, ¶79. (APP. 46). Beck 2014 Depo., (APP. 4879-4880, 4918-4920). Hearnsberger 2014 Depo., (APP. 3664, 3666, 3724, 3738-3739)

After revoking Plaintiff's Arkansas medical license, on April 30, 2014, the Board submitted a report to the National Practitioner Data Bank stating that the Board had revoked Plaintiffs medical license because Plaintiff had "violated the Medical Practices Act, in that he exhibited gross negligence and ignorant malpractice in the manner in which he performed diagnostic workup and surgical procedures." *Complaint*, ¶ 84. (APP. 48).

Plaintiff filed an appeal and a *Petition for Judicial Review* of the Board's Order revoking his medical license in Pulaski Circuit Court on May 2, 2014, *Civil Action No. 60CV-l 4-l 739*. On that same date, Plaintiff filed a *Motion to Stay Order Revoking Medical License*, and attached thereto an Affidavit of Gene McKissic, which clearly evidenced that Plaintiff had not been notified of the date and time for the hearing that had been held in his absence. *Complaint*, ¶85. (APP. 48).

On April 15, 2015, just two days prior to a scheduled hearing on *Plaintiff's Motion for Declaratory Judgment*, that had been filed in both actions that were pending in state court, the trial court in entered an Order for the parties to engage in a settlement conference to address the issues raised in both cases. *Complaint*, ¶86. (APP. 48-49). The parties held settlement conferences on May 12, 2015, and on June 4, 2015, and a tentative agreement was reached with proposed consent orders to be drafted and entered in both *Civil Action No. 60CV-14-808*, and *Civil Action No. 60CV-14-1739*.

On October 5, 2015, the trial court entered an order directing the parties to execute the proposed order prepared by the Board, Pursuant to the consent order, Williams dismissed the Petition for Judicial Review of the Order revoking his Arkansas medical

license (*Civil Action No. 60CV-14-1739*) with prejudice, and dismissed the Board defendants (Arkansas State Medical Board and Hearnsberger in his official capacity) from *Civil Action No. 60CV-14-808* with prejudice. (APP. 653).

During the settlement discussions, defendants Beck and Hearnsberger both insisted that the actions against the Board and Hearnsberger in his official capacity be dismissed "with prejudice." (APP. 4337-4342). The Board reinstated Plaintiffs medical license and agreed to postpone disposition and/or disciplinary action to be taken on the four surgical cases at issue until the final disposition of *Civil Action No. 60CV-14-808*. The consent order was executed as ordered and filed on November 3, 2015. *Complaint*, ¶88. (APP. 49).

Plaintiff filed this action on March 31, 2017 seeking damages arising from the termination of his Arkansas medical license in April, 2014. On July 26, 2017, before filing an Answer to the Complaint, the Baptist Defendants (Baptist Health, Tim Burson, Chris Cate, Susan Keathley, Scott Marotti, Everett Tucker, Douglas Weeks and Surgical Clinic of Central Arkansas) filed a motion to dismiss (APP. 143). The trial court entered an Order granting the Baptist Defendants' motion to dismiss on September 19, 2017 holding that, "the claims made in Plaintiff's Complaint are barred by res judicata." (APP. 1053)

On October 16, Plaintiff filed a *Motion to Alter or Amend the September 19, 2017 Order Granting the Baptist Defendants' Motion to Dismiss and Motion to Stay Further Proceedings Pending the Final Disposition of the Ongoing Parallel Arkansas State Court Proceedings* (APP. 1062), which was denied on November 1, 2017. (APP. 1471)

On March 8, 2018, the district court entered an Order (APP. 3394) granting Counce and Mabry's motion for summary judgment. On May 31, 2018, the district court entered an Order (APP. 5305) granting Beck and Hearnsberger's motion for summary judgment and a separate final judgment (APP. 5309) against Plaintiff. On June 29, 2018, Plaintiff filed his Notice of Appeal (APP. 5310).

Summary of the Argument

Plaintiff brings this appeal from the district court's orders granting the Baptist defendants' motion to dismiss and the other defendants' motions for summary judgment. Like the state court action that is currently pending before the Arkansas appellate court(s), Plaintiff's claims here were disposed of without even a cursory evaluation by the court[7] of the underlying accusations of medical negligence against Plaintiff.

In the absence of controlling case law providing otherwise, unlike a medical provider defending against a claim of medical negligence in a malpractice case, who is entitled to summary judgment if a claim is filed against him without supporting expert opinion evidence,[8] a medical provider like Plaintiff, who is

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[7] When moving for summary judgment and/or in filing their motions to dismiss, in both the federal and state court actions, the defendants failed to support their accusations of medical negligence with probative medical expert testimony.

[8] See Ford v. St. Paul & Fire & Marine Ins. Co., 5 S.W.3d 460, 339 Ark. 434 (Ark. 1999), ("We have held that the proof required to survive a motion for summary judgment in a medical malpractice case must be in the form of expert testimony. It is simply not enough for an expert to opine that there was negligence which was

discriminated against in disciplinary proceedings in the state of Arkansas, would be unfairly subject to the whim of any "expert," who for any number of reasons, (economic competitor, racial / sexual / religious bias, etc.) may be willing to give an unsubstantiated, false, defamatory, conclusory opinion accusing a fellow physicians of negligence when he/she expects to be insulated by statutory immunity.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. ... Due process is a flexible concept that varies with the particular situation." Winegar v. Des Moines Indep. Community Sch. Dist., 20 F.3d 895, 899-900 (8th Cir. 1994).

The evidence of record creates a genuine issue of material fact as to whether each named defendant agreed to participate in a process whereby Plaintiff would be *falsely reported* to be an *incompetent surgeon* for the longest possible period of time without being afforded any meaningful opportunity to cross examine the source of the reports under oath. As such, they acted with malice and with the intent to injure, and they should be subject to liability for all of the claims raised in the Complaint.

Argument and Citations of Authorities

I. The District Court Erred in Granting the Baptist Defendants' Motion to Dismiss

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the proximate cause of the alleged damages. The opinion must be stated within a reasonable degree of medical certainty or probability.")

This Court reviews the district court's findings construing the complaint de novo, Gwartz v. Jefferson Memorial Hosp. Ass'n, 223 F.3d 1426, 1428 (8th Cir. 1994), and reviews *de novo* the district court's dismissal of a claim based on *res judicata*, accepting the plaintiff's factual allegations as true. Smith v. Johnson, 779 F.3d 867, 870 (8th Cir. 2015).

In granting the Baptist defendants' motion to dismiss, the district noted that the claim-preclusion aspect of res judicata bars relitigation of a suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. (APP. 1054) As shown below, the district court erred in rejecting Plaintiff's opposition to the Baptist Defendants' motion to dismiss on grounds 3, 4, & 5.

A. Res Judicata Does not Apply to a Different Cause of Action Arising After the First Lawsuit was Filed

When responding to the Baptist Defendants' motion to dismiss, Plaintiff argued that the state court case is a different cause of action, and therefore distinct from the federal case here in that the state court case was brought for damages flowing from the termination of Plaintiff's medical staff privileges at Baptist in April, 2011,[9] and the federal case is for damages flowing from the revocation of Plaintiff's Arkansas medical license in

[9] Even though Plaintiff's medical staff privileges were terminated effective April, 2010, that decision did not become final until April, 2011, after Plaintiff had fully exhausted the appellate process provided for in the Baptist medical staff bylaws. *Complaint*, ¶s 44-54. (APP. 32-37).

April, 2014. (APP. 434-435). Indeed, Plaintiff alleged that the revocation of his Arkansas medical license occurred *because of* his lawsuit alleging racial discrimination pursuant to the Arkansas Civil Rights Act. See also *Complaint*, ¶ 94, (APP. 51).

In granting the Baptist Defendants' motion to dismiss, the district court held that, "the instant case is barred by res judicata because Plaintiff brought essentially the same case in *Williams I*." (APP. 1054). In another part of its Order dismissing the Baptist defendants, the district court held that, "[t]he claims brought in this action and the claims made in *Williams I* are based upon the same set of facts. Plaintiff was not limited to filing state court claims in state court. He could have filed all of his claims, whether arising under state or federal law, in *Williams I*." (APP. 1056).

The district court further held that, "Plaintiff's argument that certain claims arose as a result of filing *Williams I*, or at the time of his medical license revocation in April 2014, is also flawed. ... Plaintiff sought to have the April 2014 hearing regarding the revocation of his medical license enjoined. The state court denied Plaintiff's relief.[10] Plaintiff cannot claim that the revocation of his license on April 2014 created a '*new*' *claim* that has not yet been litigated. The specific issue was before the court in *Williams I*." (APP. 1057). (Footnote Added.) (Emphasis Added.)

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[10] This holding is erroneous as the Order which dismissed two of the Baptist defendants with prejudice, and which also directed that Plaintiff's Arkansas medical license be reinstated further provided that, "[t]he Board *shall not proceed* on [the four cases related to the license revocation] *with any disciplinary actions* [] until Dr. Williams' case against the remaining defendants in this case, Pulaski County Circuit Case No. 60CV14-808, is concluded." (APP. 655) (Emphasis Added.)

The district court's reasoning referenced above is erroneous because it conflates the doctrines of claim preclusion and issue preclusion under Arkansas law. Indeed, the specific issue[11] related to the appropriateness of the revocation of Plaintiff's Arkansas medical license in April, 2014 was decided in Plaintiff's favor when it was Ordered that his license be reinstated immediately on November 5, 2015, and that, "the Board shall not proceed on those cases with any disciplinary actions regarding those cases until Dr. Williams' case against the remaining defendants in this case, Pulaski County Circuit Case No. 60CV14-808, is concluded." (APP. 655).

"Arkansas preclusion law has two facets. One being issue preclusion and the other being claim preclusion.[12] Issue preclusion bars relitigation of issues of law or fact previously litigated, provided that the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question and that the issue was essential to the judgment." Germain Real Estate Co. v. HCH Toyota, LLC, 778 F.3d 692, 695 (8th Cir. 2015). (Citations Omitted.) (Footnote Added.)

The revocation of Plaintiff's Arkansas medical license was a new, distinct overt act causing new distinct injuries to Plaintiff subsequent to the day in

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[11] "Arkansas courts apply issue preclusion when the following elements are met: (1) the issue sought to be precluded is the same issue involved in the prior litigation, (2) the issue was actually litigated, (3) the issue was determined by a valid and final judgment, and (4) the determination was essential to the judgment." Germain Real Estate Co., at 695.

[12] Plaintiff's "claim" for damages arising from the "unlawful" revocation of his Arkansas medical license, however, was never at issue before the Arkansas state court.

April, 2014 when his Arkansas medical license was revoked, without regard to the appropriateness of any related injunctive[13] relief that had been first sought by Plaintiff in his February 25, 2014-Complaint.

Moreover, although it may have been premised on the same perceived discriminatory treatment that had continually existed and which caused Plaintiff to seek injunctive relief from the Medical Board in the first instance, the revocation of Plaintiff's medical license, a distinct overt act, had not yet occurred when Plaintiff's Complaint was filed on February 25, 2014. See Varner v. Peterson Farms, 371 F. 3d 1011, 1019 (8th Cir. 2004), ("even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act. For statute of limitation purposes, the focus is on the timing of the causes of the injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts.")

Further, on February 25, 2014, Plaintiff could not have included claims for damages related to the April, 2014 retaliatory revocation of his medical license that had not yet occurred. "It is well settled that claim preclusion does not apply to claims that did not arise until ***after*** the first suit was filed." The Baker Group,

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[13] See Walker v. Mem'l Health Sys., 231 F. Supp. 3d 210, 217 (E.D. Texas 2017), (The district court ordered "Defendant [hospital], its respective officers, agents, employees, and anyone acting on its behalf to immediately submit to the National Practitioners Data Bank a Void Report regarding Dr. Walker, and all such entities and persons shall refrain from filing any other statements or reports with the National Practitioners Data Bank relating to the actions the Hospital has taken against Dr. Walker in connection with the peer review process that is the subject of this lawsuit, including the imposition of a proctoring requirement, during the pendency of this suit.")

L.L.C. v. Burlington Northern and Santa Fe Railway Co., 228 F.3d 883, 886 (8th Cir. 2000). See also Lundquist v. Rice Memorial Hospital, 238 F.3d 975, 977 (8th Cir. 2001), ("Claim preclusion, however, does not apply to claims that did not exist when the first suit was filed.")[14]

It would be irrational to allow the Medical Board defendants to *knowingly agree* to go forward with a hearing without providing the required statutory notice[15] to Plaintiff and revoke his medical license in his absence *after* being served with a Complaint seeking injunctive relief which is consistent with the Board's customary policies and procedures.

"As a matter of logic, when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion generally does not come into play. Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by res judicata regardless of whether they are premised on facts

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[14] See also Curtis v. Citibank, N.A., 226 F.3d 133, 139 (2nd Cir. 2000), ("The crucial date is the date the complaint was filed. The plaintiff has no continuing obligation to file amendments to the complaint to stay abreast of subsequent events; plaintiff may simply bring a later suit on those later-arising claims.")

[15] See *A.C.A. § 17-95-410(c)(2)*, which requires that the Board send "*by registered mail to the person's last known address of record* a copy of the order·and notice of hearing along with a *written notice of the time and place of the hearing* ..." (Emphasis Added.) See also Davis v. Schimmel, 253 Ark. 1201, 482 S.W.2d 785, 792 (Ark. 1972), ("When an action is based on constructive service, no action is commenced or cause pending until the proceedings provided for in the *governing statute are complied with and if there is no such compliance, the proceedings are void*, and the court has no power to take affirmative action.") (Emphasis Added.)

representing a continuance of the same course of conduct." Legnani v. Alitalia Linee Aeree Italiane, S.P.A., 400 F.3d 139, 141 (2nd Cir. 2005). See also Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1357 (11th Cir. 1998), ("the parties frame the scope of litigation at the time the complaint is filed.") When he responded to the Baptist Defendants' motion to dismiss, Plaintiff made it clear that the federal claims and supplemental state law claims raised in his Complaint accrued in April, 2014 when his Arkansas medical license was revoked. (APP. 435-436). Clearly, these claims did not exist at the time that Plaintiff filed his Complaint in state court on February 25, 2014. In Ripplin Shoals Land Co., LLC v. United States Corps of Eng'rs, 440 F.3d 1038, 1042 (8th Cir. 2006), another case appealed to this Court from the district court in the Eastern District of Arkansas, this Court recognized that, "res judicata does not apply to claims that did not exist when the first suit was filed."

"The determination of whether a litigant has asserted the same cause of action in two proceedings depends upon whether the primary right and duty are the same in both cases." Pleming, *supra*, at 1356. The primary right and duty in the state court action (*Williams I*) involve the *damages arising from* the termination of Plaintiff's medical staff privileges at Baptist in 2011. The primary right and duty in this federal action (*Williams II*) involve the damages arising from the revocation of Plaintiff's Arkansas medical license in April, 2014.

The Eleventh Circuit Court of Appeals in Pleming held that, "we cannot accept Universal-Rundle's contention that Pleming litigated her claims arising out of the October 1994 incidents, including her claims of retaliation for filing *Pleming I*, simply by

offering the incidents as evidence of pretext in a distinct employment decision. This is not a case in which the plaintiff squarely presented an issue for decision in the first litigation and failed to carry the burden of proof; rather, it was neither framed by the pleadings as an issue nor decided by the district judge." Id., at 1360.

Here, Appellant did not present his claims arising from the revocation of his medical license in April, 2014, to include the retaliation claim, to the state court in *Williams I* for disposition, and it is also clear that the state court did not decide the issues related to the April, 2014 revocation of Plaintiff's medical license. In fact, Plaintiff expressly reserved any such claims related to the April, 2014 revocation of his medical license pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421 (1964).[16] See December 1, 2014 *Plaintiff Victor Bernard Williams, M.D.'s Brief in Support of Plaintiff's Motion for Declaratory Judgment and Motion to Disqualify Mr. Kevin O'Dwyer And the Law Firm of Hope, Trice & O'Dwyer, P.A., As Counsel in the Action as Referenced above*, (APP. 456-457).

Further, and more importantly, the state court's November 5, 2015 Order reinstating Plaintiff's Arkansas medical license tacitly recognized Plaintiff's England reservation and the possibility of future claims for damages related to the April, 2014-revocation of

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[16] See First American Bank & Trust Co. v. Ellwein, 520 F.2d 1309, 1311 (8th Cir. 1975), ("an express reservation of constitutional questions need not be made to invoke the judge-made rule in *England*. A litigant may return to federal court with his federal constitutional questions without an express reservation 'unless it clearly appears that he fully litigated his federal claims in the state courts." (Citation Omitted.")

Plaintiff's Arkansas medical license by holding that, "neither party shall retaliate against the other party for claims and/or counterclaims made against each other in *any lawsuit filed to date or in the future*." (APP. 655). (Emphasis Added.) See Pleming, *supra*, at 1357, ("A court, therefore, must examine the factual issues that must be resolved in the second suit and compare them with the issues explored in the first case.")

B. The State Court's Limitations on Discovery Thwarted Plaintiff's Ability to Litigate His Discrimination Claims in State Court

In arguing that he did not have a full and fair opportunity to litigate his claims in state court, Plaintiff argued that since all but one of his state law claims were decided on summary judgment, the withholding of discovery of peer review records of other physicians deprived him of a fair opportunity to respond to the motions for summary judgment against him (i.e., that they were not "fully contested in good faith") because the discovery orders deprived him of evidence that he needed to show that he was treated differently than similarly situated white physicians on the Baptist medical staff. (APP. 436-437); (APP. 680-682). In granting the Baptist Defendants' motion to dismiss, the district court held that, "A judge's determination that certain information could not be obtained by Plaintiff due to Arkansas law does not result in a failure to fully contest the case in good faith." (APP. 1056).

Appellant's *federal claims* being asserted here against the Baptist Defendants could not have been fairly litigated in state court without Plaintiff being able to first obtain discovery of information related to

other physicians on the medical staff at Baptist.[17] Therefore, the district court erred in holding that Plaintiff had a fair opportunity to litigate his federal claims being asserted here in state court.

C. The Trial Court Erred in Holding that the Baptist Defendants Were in Privity with Defendant Surgical Clinic of Central Arkansas

"The doctrine of res judicata does not bar claims even arising out of the same facts against defendants who were not parties to the first action." Headley v. Bacon, 828 F.2d 1272, 1275 (8th Cir. 1987). Here, it is clear that Defendant Surgical Clinic of Central Arkansas was not a defendant in *Williams I*. In opposing the Baptist Defendants' motion to dismiss, Plaintiff argued that, "privity would be lacking for purposes of res judicata" with respect to his claims against Defendant Surgical Clinic of Central Arkansas. (APP. 438-439).

First, "[n]othing requires a plaintiff to sue the prospective defendants simultaneously." Winkler v. Bethell, 210 S.W.3d 117, 121 (Ark. 2005). Secondly, "because two additional defendants [Surgical Clinic of Central Arkansas and Beck] were named in the second suit, the question remains whether these additional defendants may be said to be in privity for res judicata purposes with the defendants in the first suit. The answer depends on whether their interests in the later litigation were adequately congruent to those of the

[17] After the district court entered its order dismissing the Baptist Defendants on the ground of res judicata, Plaintiff unsuccessfully sought to have the district court amend its Order and abstain until the Arkansas Appellate Court's final disposition of the appeal of the discovery orders. See Section IV below.

defendants in the earlier suit." Mills v. Des Arc Convalescent Home, 872 F.2d 823, 827 (8th Cir. 1989). The Orders (APP. 310, 311, 386, & 389) entered by the state court, and which are currently being appealed to the Arkansas Appellate courts fail to provide the requisite specificity needed to grant summary judgment here based on res judicata.

II. The District Court Erred in Granting Counce and Mabry's Motions[18] for Summary Judgment

Summary Judgment is reviewed de novo viewing the evidence in the light most favorable to the nonmoving party. Wealot v. Brooks, 865 F.3d 1119, 1124 (8th Cir. 2017). This Court reviews de novo the district court's dismissal of a claim based on *res judicata*, accepting the plaintiff's factual allegations as true. Smith v. Johnson, 779 F.3d 867, 870 (8th Cir. 2015).

In its March 8, 2018 Order granting Counce and Mabry's motion for summary judgment, the district court held that, "Plaintiff did not include Counce and Mabry as defendants but he was well aware of their reports during the time *Williams I* was pending. Res judicata bars Plaintiff's claims against Drs. Counce and Mabry because they could have been litigated in *Williams I*." (APP. 3395)

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[18] Counce filed his two motions for summary judgment on November 16, 2017 (APP. 1524, 1557 & 1567) and January 25, 2018 (Docs. 83, 84 & 85). Mabry filed his two motions for summary judgment on November 22, 2017 (APP. 1561, 1601 & 1604) and January 25, 2018 (APP. 3020, 3024 & 3028). Plaintiff's responses and briefs in opposition were filed on December 18, 2017 (APP. 1665, 1828, 2132, 2491 & 2519), and February 8, 2018 (APP. 3039, 3192, 3203 & 3366).

The district court erred when it held that Plaintiff's claims against Counce and Mabry[19] were barred by res judicata because they were not parties in the state court action. Further, "the admissibility, veracity, plausibility, and/or reliability of the opinions, statements, and/or conclusions contained [Counce and Mabry's] "narrative reports" have never been adjudicated and/or otherwise evaluated by any court during the litigation of any of the previous three civil actions [brought by Plaintiff] that involved the patient care at issue in this case. (APP. 2140), (APP. 1669).

When Counce and Mabry moved for summary judgment in this case, Plaintiff objected to their "narrative reports" "to the extent [they purport] to establish as an evidentiary fact, that Plaintiff committed "gross negligence" and/or "ignorant malpractice." (APP. 2140), (APP. 1669). Plaintiff objected to the conclusions contained in the reports because they failed not only to comply with *Rule 702* of the *Federal Rules of Evidence* and Daubert v. Merrell Dow Pharmaceuticals, Inc., but they also failed to comply with the requirements of Arkansas law with respect to allegations of medical negligence (*A.C.A. § 16-114-206(a)*), as interpreted by the Arkansas courts in Dodd v. Sparks Regional Medical Center, 204 S.W.3d 579 (2005), Neal v. Sparks Reg'l Med. Ctr., 422 S.W.3d

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[19] In further responding to Mabry's first motion for summary judgment, Plaintiff argued that the medical treatment reviewed by Mabry, which occurred in February and March, 2009, "was necessarily encompassed by the renewal of Plaintiff's medical staff privileges on April 1, 2010, as it occurred well within the look back period applicable to Plaintiff's reapplication process." (APP. 1680). During the state court bench trial, the court found that the "lookback period" for the re- application process was from September 1, 2007 to August 30, 2009.

116, Fryar v. Touchstone Physical Therapy, Inc., 229 S.W.3d 13 (Ark. 2006), and Ford v. St. Paul Fire & Marine Ins. Co., 339 Ark. 434, 437, 5 S.W.3d 460, 462 (1999). (APP. 2139-2144), (APP. 1670-1673).

With respect to the district court's holding that Counce and Mabry are entitled to immunity, this holding is erroneous because "Congress [has] specifically provided that [such] immunity [does] not extend to actions for damages for violations of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et. seq., and the Civil Rights Act, 42 U.S.C. §§ 1981, et seq." See Braswell v. Haywood Reg'l Med. Ctr., 352 F.Supp. 2d 639, 650 (W.D. N.C. 2005).

III. The District Court Erred in Granting Beck and Hearnsberger's Motion for Summary Judgment

In granting Hearnsberger and Beck's motion for summary judgment, the district court held that, "Defendants Hearnsberger and Beck are immune from suit for all *federal and state law damage* claims pursuant to Ark. Code Ann. § 17-80-103." (APP. 5307). (Emphasis Added.)

It is clearly established, even under Arkansas state law, that a state statute, *A.C.A. § 17-80-103*, may not be used to immunize Beck and Hearnsberger from Plaintiff's federal claims, even had Plaintiff attempted to bring them in state court. See Ark. State Med. Bd. v. Byers, 521 S.W.3d 459, 465 (2017). See also Howlett v. Rose, 496 U.S. 356, 376 (1990), ("Conduct by persons acting under color of state law which is wrongful under *42 U.S.C. § 1983* or *§ 1985(3)* cannot be immunized by state law.")

Secondly, Beck and Hearnsberger are not "absolutely immune from personal liability under § 1983

solely by virtue of the 'official' nature of their acts." Hafer v. Melo, 502 U.S. 21, 31 (1991). Instead, the focus should be on the state official's specific acts or omissions that caused and/or contributed to the injury suffered by Plaintiff. In Hafer, the United States Supreme Court repeated its holding that, "no more than a qualified immunity attaches to administrative [ ] decisions, even if the same official has absolute immunity when performing other functions." Id., at 29. The Supreme Court in Hafer also reiterated its holding that, "Congress enacted § 1983 'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, [regardless of] whether they act in accordance with their authority or misuse it.'" Id., at 28. (Citations Omitted.) "Through § 1983, Congress sought 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.'" Id., at 27.

In this case, the distinction between acts that were undertaken within and/or outside the scope of duties in this action only pertain to the pendent state law claims Count V (abuse of process), Count VI (tortuous interference with contractual and business relationships), & Count VII (defamation)) raised by Plaintiff in his federal action. (APP. 57-59).

In his Complaints, both here and in state court, Plaintiff alleged that the investigatory actions undertaken by defendant Hearnsberger were unauthorized[20] and in violation of *A.C.A. § 17-95-*

[20] In his *Complaint*, Plaintiff alleged that Hearnsberger "acted maliciously, outside the scope of his lawful authority, as a member of Defendant Arkansas State Medical Board, and is being sued individually and in personal capacity." (APP. 20). (Emphasis

301(h)(2), which provides that, "[n]o member of the Board may be involved in the conduct of the investigation except to cooperate with the investigation as required by the investigator." *Williams I Complaint*, ¶37 (APP. 166). The medical Board routinely utilizes investigators in order to obtain material facts related to cases pending before the Medical Board. See Hollabaugh v. Arkansas State Medical Bd., 861 S.W.2d 317, 320, 43 Ark. App. 83, 86 (Ark. App. 1993), and Arkansas State Medical Bd. v. Grimmett, 463 S.W.2d 662, 665 (Ark. 1974). Indeed, the Board used at least one of its investigators to investigate Plaintiff. The "February 6, 2014 Board minutes indicate that, "[u)pon a motion by Dr. J. Hearnsberger, seconded by Dr. J. Weiss, (partner with Dr. Counce, Board expert) the Board voted unanimously to canvas Little Rock surgery centers to determine whether Dr. Williams is performing surgeries and if so, whether he was the primary or assistant surgeon. If it is determined that he has performed surgeries, a Board poll will be conducted concerning the issue of an Emergency Order of Suspension." *Williams I Complaint*, ¶32, FN3. (APP. 164). See also October 4, 2012, and February 6, 2014 Board Minutes. (APP. 651-652). The investigator did not find any violations as Williams did not violate the agreement that he had entered into with the Board regarding the proctor and not performing any surgeries after the June 8, 2012 hearing. (APP. 1082).

To the extent that a fact question exists as to whether Hearnsberger's investigatory conduct *violated A.C.A. § 17-95-301(h)(2)*, and was a contributing factor

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Added.) Regarding Hearnsberger's authority to investigate, see Cryer Depo., (APP. 4114-4116).

in the other Board members' decision to vote to revoke Plaintiff's Arkansas medical license, a jury question also exists as to malice. In defining malice, the Arkansas Supreme Court has stated:

> It is true that in law malice is not necessarily personal hate. It is rather an intent and disposition to do a wrongful act greatly injurious to another. Malice is also defined as the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent.... ***A conscious violation of the law*** ... which operates to the prejudice of another person. A condition of the mind showing a heart ... fatally bent on mischief.

Stoner v. Ark. Dep't of Corr., 983 F. Supp. 2d 1074, 1103 (E.D. Ark. 2013).

In addition, Dr. Hearnsberger engaged in ex parte[21] conduct by calling several of Dr. Williams' professors, and it is clear that making such calls would not be encompassed by the official duties for which Hearnsberger may be entitled to "judicial immunity," (i.e., for adjudicatory, and/or "quasi judicial" role sitting

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[21] *A.C.A. § 25-15-209(a)* requires that, "[u]nless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make final or proposed findings of fact or conclusions of law in any case of adjudication *shall not communicate, directly or indirectly, in connection with any issue of fact with any person or party* nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate."

in judgment with respect to the medical cases then pending before the Board.)

There is a genuine issue of fact as to whether Hearnsberger was acting within the scope of his official duties when he sent an email to the Board's executive secretary purportedly memorializing negative comments made by one of Plaintiff's former professors and directed that the email be distributed to the other Board members.[22] See Hearnsberger depo., (APP. 3667-3669 & 3673). He clearly intended for the other Board members to have the information provided by him when considering any future action(s) that may be taken against Plaintiff. There is no evidence in the record that the Medical Board ever voted to give Hearnsberger the authority to conduct this independent investigation, in addition to fulfilling his "quasi judicial" role as a Medical Board member. "That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." Winthrow v. Larkin, 421 U.S. 35, 58 (1975).

It was only immediately after Plaintiff appeared before the scheduled June, 2012 hearing with witnesses to testify on his behalf, one of whom was a current UAMS professor, that Hearnsberger took it upon himself to call Plaintiff's former professors and direct

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[22] Dr. Eidt, according to Hearnsberger, referred to Plaintiff as "hard-headed and [a] poor resident." Hearnsberger Depo., (APP. 3668-3669). Yet, Eidt rated Plaintiff as "above average" in all categories on the evaluation form executed by Eidt, which was obtained by Plaintiff from his file at UAMS after he learned of Hearnsberger's email. See APP. 477

that a purportedly negative report from one[23] of them be submitted to the other Medical Board members. "Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration of a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." Id.

Hearnsberger's investigatory actions are even more troubling, when considered along with the objective evidence (morbidity/mortality rates) that Plaintiff submitted to be evaluated at the Medical Board's request, which was given to Hearnsberger,[24] but was apparently never evaluated by him and/or considered by the Medical Board. See (APP.650), December 2, 2010-Medical Board minutes wherein it is reflected that the Medical Board requested that "the physician provide the Board his morbidity rate statistics." There are issues of fact, as to what, if anything, the Medical Board did with this information (morbidity/mortality statistics). Compare Cryer Depo., (APP. 4112), Hearnsberger Depo., (APP. 3717-3719); and Beck Depo., (APP. 4934).

The morbidity/mortality information is objective in nature and could be used to evaluate discrimination claims like those being asserted here. See Ennix v. Stanten, 556 F. Supp. 2d 1073, 1086 (N.D. Cal. 2008), ("[t]he argument made by defendant is that Dr. Ennix had an abnormally high mortality rate associated with his surgeries, whereas the argument made by Dr.

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[23] Hearnsberger did not make records of the conversations he had with Plaintiffs other professors, including Dr. Westbrook, and Dr. Richard Turnage. Hearnsberger Depo., (APP. 3674-3677).

[24] Hearnsberger 2014 Depo., (APP. 3717-3719).

Ennix is that this was not so.") In denying the defendants' motion for summary judgment on the plaintiff cardiac surgeon's Section 1981 claim and finding that "the battle of statistics cannot be resolved on summary judgment and needs to be sorted out through the examination of qualified witnesses," the district court in Ennix also held that, "[a] jury could also reasonably find that Dr. Ennix was denied the right to contract for those services. The summary suspensions and proctoring requirement impeded the contractual relationship because Dr. Ennix either could not practice at all or he could no longer be lead surgeon.")

In addition to its failure to properly evaluate the morbidity/mortality rates provided by Plaintiff, there is no evidence that the Medical Board has ever sought to compare Plaintiff's morbidity/mortality rates to the other physicians on the medical staff at Baptist. The district court's Order granting the Baptist defendants' motion to dismiss in this case based upon res judicata rendered any potential efforts to obtain such information during discovery in this case either moot and/or futile. In the state court action (*Williams I*), Plaintiff sought discovery of the Mortality and Morbidity rates of the other surgeons on the medical staff at Baptist but Baptist objected to providing them during discovery asserting, among other things, the Arkansas peer review privilege.[25] (APP. 572-573).

In addition to allowing Hearnsberger to conduct his individual ex parte investigation,[26] Plaintiff alleged

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[25] At Baptist, Morbidity/Mortality rates are types of information that are reviewed when a surgeon is re-credentialed because "it gives some information to the reviewer as to clinical outcomes, clinical efficiency, things of that nature." (APP. 2088).

[26] See Cryer Depo., (APP. 4115-4116).

that Beck "condoned and/or ratified the Board's initiation of an unauthorized investigation against Plaintiff even though he knew that it was the Board's policy to wait until the final decision from the hospital and/or the conclusion of any related judicial proceedings before seeking to discipline a physician regarding matters that have been subject to hospital disciplinary proceedings. See *Williams II Complaint*, 22, ¶ 49 - (APP. 34).

In granting Hearnsberger and Beck's motion for summary judgment, the district court held that, "[e]ven if the Doctors were not immune to Plaintiff's claims, Plaintiff has failed to present any evidence that the actions taken by Doctors Hearnsberger or Beck regarding Plaintiff's licensure were based on racial animus or in retaliation." (APP. 5307).

First, in order to pursue a claim of retaliation[27] for having opposed perceived discrimination by filing a lawsuit, it is not required that a Plaintiff must first show evidence that discrimination did in fact occur. See Wallace v. Sparks Health Sys., 415 F.3d 853, 858 (8th Cir. 2005), ("We are mindful that a [party] must be shielded from retaliation for protected activity, even if a court eventually decides that the [party's] complaints are without merit, as long as the [party] reasonably believed the employer's conduct [was unlawful discrimination]." See also CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457 (2008), ("*42 U.S.C. § 1981* encompasses claims of retaliation.")

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[27] To establish a prima facie case of retaliation under [§ 1981], a plaintiff must show that he engaged in protected conduct, that defendants took an adverse action against him, and that there was a causal link between the two. McCullough v. Univ. of Ark. for Med. Scis., 559 F. 3d 855, 864 (8th Cir. 2009).

In addition, with respect to Plaintiff's *First Amendment* retaliation claim, "[t]he cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future." Harrison v. Springdale Water & Sewer Com., 780 F.2d 1422, 1425-1426 (8th Cir. 1985). "An individual is entitled to free and unhampered access to the courts." Id., at 1428. "An act taken in retaliation for the exercise of a constitutionally protected right is actionable under *§ 1983* even if the act, when taken for a different reason, would have been proper." Id., at 1428, citing Matzker v. Herr, 748 F.2d 1142, 1150-1151 (7th Cir. 1984).

Regarding the malice necessary in order to overcome immunity from Plaintiff's state law claims, in addition to the violations of state law referenced above, Plaintiff also argued that genuine issues of material fact exist regarding whether Hearnsberger and Beck engaged in bad faith conduct during the settlement negotiations by insisting that Plaintiff's claims be dismissed "with prejudice." See (APP. 4145-4148).

In Wade v. Haynes, 663 F.2d 778, 786 (8th Cir. 1981), this Court held that, "[m]alicious conduct has long been defined so as to include 'culpable recklessness or a willful and wanton disregard' of another's rights... liability in civil rights cases may be incurred even though an official does not possess 'any actual malice or intent to harm (but) is so derelict in his duties that he must be treated as if he in fact desired the harmful results of his inactions.' This is so because deliberate intent may be predicated on factual circumstances which are so egregious and reckless that the natural

consequences of the actor's conduct implies the requisite malicious intent to do wrong. ... Thus we conclude a finding of malice may be found from an official's reckless and callous disregard of known dangers." (Citations Omitted.)

In granting Beck and Hearnsberger's motion for summary judgment, the district court found that, "[t]he Board's version of the Consent Order, which was filed in the case on November 5, 2015, did not include the Plaintiff's proposed language regarding reports made to the NPDB by ASMB." (APP. 5308). In fact, the November 5, 2015 Consent Order did not include any language regarding NPDB reports, and therefore, that issue was not decided and was not material to the action taken by the trial court on Plaintiff's Petition for Judicial Review in remanding[28] the case back to the ASMB. "Issue preclusion bars the relitigation of an issue that was actually litigated in a prior action and was determined by, and essential to, a valid and final judgment." Smith v. Johnson, 779 F.3d 867, 871 (8th Cir. 2015). "The Arkansas Supreme Court requires a party invoking issue preclusion to establish 'the precise issue' was decided in the first proceeding, and interprets 'very narrowly' whether an issue was previously litigated." Id., at 871.

Here, there should not have been any NPDB reports submitted by the ASMB because there had been no proper adjudication. "'Adjudication' is defined as an 'agency process for the formulation of an order.' 'Order' is defined as the 'final disposition of any agency

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[28] "A circuit court's order of remand to an administrative agency for further proceedings is not a final order. This is true even where, as here, the circuit court has affirmed the agency's findings in part." Ark. Ins. Dep't v. Henley, 481 S.W.3d 467, 468 (Ark. App. 2016), (Footnotes and Citations Omitted.)

in any matter other than rule making, including licensing and rate making, in which the agency is required by law to make its determination after notice and hearing.' *Where there has been no adjudication before the administrative agency, there has been no 'final agency action' to be reviewed pursuant to Ark. Code. Ann. § 25-15-212*." Baber v. Ark. State Med. Bd., 2010 Ark. 243, 248, 368 S.W.3d 897, 901 (Ark. 2010).

The fact that the Consent Order contains language that the "Arkansas State Medical Board and the Arkansas State Medical Board members in their official capacity shall be dismissed by Dr. Williams with prejudice," can not be separated from additional the words that follow, "*upon certain conditions*." (APP. 654) (Emphasis Added.)

"[U]sually, a dismissal with prejudice is as conclusive of the rights of the parties as if there had been an adverse judgment as to the plaintiff after a trial, but there are limitations to the doctrine of res judicata as recognized by our court of appeals." Lindsey v. Green, 2010 Ark. 118, 369 S.W.3d 1, 7 (Ark. 2010). See also Crawford v. Paris, 897 F. Supp. 928, 931 (D. Md. 1995), ("Inasmuch as no hearing has been held by the BPQA, much less no final decision rendered by it, any court challenge is premature.")

Plaintiff's claims asserted against Hearnsberger and Beck in their individual capacities, however, do not have to await a final disposition by the Arkansas State Medical Board after remand. See Conner v. Reinhard, 847 F.2d 384, 395 (7th Cir. 1988), wherein the Seventh Circuit Court of Appeals held that, "[a]lthough we recognized that FBI agents sued in their official capacities would be in privity with each other, where government officials are sued in their personal capacities, privity does not exist." "For liability under

section 1983, direct participation by a defendant is not necessary. Any official who 'causes' a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should have reasonably have known[29] would cause others to deprive the plaintiff of her constitutional rights." Id., at 396-397. (Footnote Added.)

Further, when responding to Beck's motion for summary judgment, Plaintiff argued that his position was analogous to that of a supervisor. (App. 4140). "A supervisor may be held individually liable under § 1983 if he directly participates in the constitutional violation or if he fails to train or supervise the subordinate who caused the violation." Riehm v. Engelking, 538 F.3d 952, 962-963 (8th Cir. 2008).

IV. The District Court Erred in Denying Plaintiff's Motion to Amend the September 19, 2017 Order Granting the Baptist Defendants' Motion to Dismiss

After the district court entered its order (APP. 1053) granting the Baptist defendants' *Rule 12(b)(6)* motion to dismiss, Plaintiff filed a motion pursuant to *Rule 59(e)* and *Rule 60(b)* to alter or amend the September 19, 2017 Order dismissing the Baptist defendants, and a motion to stay further proceedings

[29] See Hearnsberger 2018 Depo., (APP. 3533), "He volunteered to have a proctor, and as far as I remember, it was an unrestricted license." See Beck 2018 Depo., (APP. 3496), "Before I left the board there was some back-and-forth between Juli and Kevin about [the National Practitioner Data Bank Report], but I wasn't a party to it."

and/or to abstain[30] pending the final disposition of the Arkansas state court proceedings that remain subject to appeal in the Arkansas Appellate Courts. (APP. 1062). On November 1, 2018, the district court entered an Order denying both motions without reasoning or explanation. (APP. 1471).

"A district court has broad discretion in determining whether to grant a *Fed.R.Civ.P. 59(e)* motion to alter or amend judgment, and this court will not reverse absent a clear abuse of discretion. An abuse of discretion will only be found if the district court's judgment was based on clearly erroneous factual findings or erroneous legal conclusions." Innovative Home Health Care v. P.T.-O.T. Assoc., 141 F.3d 1284, 1286 (8th Cir. 1998). Similarly, this Court reviews a district court's denial of relief under Rule 60(b) only for abuse of discretion. Arnold v. Wood, 238 F.3d 992, 998 (8th Cir. 2001). Abstention decisions are also reviewed for abuse of discretion, but the underlying legal questions are subject to plenary review. Beavers v. Arkansas State Bd. of Dental Exam'rs, 151 F.3d 838, 840 (8th Cir. 1988). In Robinson v. Omaha, 866 F.2d 1042, 1043 (8th Cir. 1989), this Court held that, "since the practice of abstention is equitable in nature, this court may raise the issue of the appropriateness of abstention sua sponte."

"Under Rule 60(b) the movant must demonstrate exceptional circumstances to justify relief. Exceptional circumstances exist where the judgment bars adequate

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[30] Because Plaintiff's Complaints raised racial discrimination claims against Baptist in both his federal and state court actions, after the district court granted the Baptist defendants' motion to dismiss on grounds of res judicata, Plaintiff sought to have the district court abstain, pending the disposition of the appeal of his state court action.

redress. While relief under Rule 60(b) is 'extraordinary,' a Rule 60(b) motion is to be given a liberal construction so as to do substantial justice and 'to prevent the judgment from becoming a vehicle for injustice. This motion is grounded in equity and exists 'to preserve the delicate balance between the sanctity of final judgments and the incessant command of a court's conscience that justice be done in light of all the facts.'" Baker v. John Morrell & Co., 266 F.Supp.2d 909, 920 (N.D. Iowa 2003), citing MIF Realty L.P. v. Rochester Assoc., 92 F.3d 752, 755-756 (8th Cir. 1996). (Additional Citations Omitted.)

In support of his motion to amend and/or alter the September 19, 2017 Order granting the Baptist Defendants' motion to dismiss on the grounds of res judicata, Plaintiff argued that, "a stay would be appropriate here, particularly given the fact that Plaintiff [had] not yet presented his federal [discrimination] claims to state court, and the possibility that on appeal, the Arkansas appellate courts may reverse the trial court's summary judgment on Plaintiff's ***discrimination claims*** [against the Baptist defendants that were] brought pursuant to the Arkansas Civil Rights Act." (APP. 1069).

In arguing that the district court should have abstained from ruling on Plaintiff's discrimination claims against the Baptist defendants here, Plaintiff relies primarily upon the *Pullman* abstention doctrine even though the district court's order dismissing Plaintiff's claims against the Baptist defendants based upon *res judicata*, if correct, may also implicate the Younger abstention doctrine.

"In Younger v. Harris, 401 U.S. 37 (1971), the United States Supreme Court directed 'federal courts to abstain from hearing cases when (1) there is an

ongoing state judicial proceeding which (2) implicates important state interests, and when (3) that proceeding affords an adequate opportunity to raise the federal questions presented." Norwood v. Dickey, 409 F.3d 901, 903 (8th Cir. 2005).

The Eighth Circuit considers five factors in deciding whether to abstain from a case under the *Pullman* abstention doctrine: "what effect will abstention have on the rights to be protected, whether there are available state remedies, whether the challenged state law is unclear, whether the state law is fairly susceptible of an interpretation that would avoid any federal constitutional question, and whether abstention will avoid unnecessary federal interference in state operations." R. v. Adams, 649 F.2d 625, 628 FN6 (8th Cir. 1981). (Citation Omitted.)

"Abstention is proper when a federal constitutional issue might be mooted by a state-court determination of pertinent questions of state law. 'Pullman requires a federal court to refrain from exercising jurisdiction when the case involves a potentially controlling issue of state law that is unclear, and the decision of the issue by the state courts could avoid or materially alter the need for a decision on federal constitutional grounds." Doe v. McCulloch, 835 F. 3d 785, 788 (8th Cir. 2016). Applying this reasoning here, the district court should have abstained from proceeding further pending the final disposition of the appeal of Plaintiff's parallel state court action by the Arkansas Appellate courts.

In the event of a reversal of the state court's discovery orders, summary judgment order(s), and/or denial of jury trial denial order, by the Arkansas Appellate court(s), there is no reason why Plaintiff couldn't obtain *full relief* from the Baptist defendants

at trial on his claims brought pursuant to the Arkansas Civil Rights Act in the state court action. See Baker, supra, 266 F. Supp. 2d at 921, ("In Baker's complaint, she specifically averred a cause of action under Title VII. Yet, the factual allegations contained in her complaint also support claims under Iowa's parallel anti-discrimination statute, the ICRA.") The district court in Baker further held that the "ICRA claims do not present any new issues but merely a separate statutory provision that provides for recovery under the same set of facts and for the same conduct." Id., at 928.

Plaintiff first filed his discrimination claims in Arkansas state court pursuant to the Arkansas Civil Rights Act. See Alexander v. E. Tank Services, Inc., 2016 Ark. App. 185, 486 S.W.3d 813, 816 (Ark. App. 2016), ("The ACRA provides citizens of the state legal redress for civil-rights violations of state constitutional or statutory provisions, hate offenses, and discrimination offenses, and ACRA claims are analyzed under the same principles as [federal discrimination] claims.") However, based upon the discovery rulings of the Arkansas circuit court, and apparently[31] because he relied upon the Arkansas Civil Rights Act instead of federal law, Plaintiff was deprived of discovery notwithstanding the expressed provision of the Arkansas Civil Rights Act, *A.C.A. § 16-123-105*©, which provides that, "when construing this section, a court may look for guidance to State and Federal decisions interpreting the federal Civil Rights Act of

[31] The trial court's order denying Plaintiff's motion to compel discovery from the Baptist defendants which is at issue in the appeal of the state court action failed to state the reasoning for the denial. (APP. 642.)

1871, as amended and codified in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only." (APP. 484). See also Island v. Buena Vista Resort, 103 S.W.3d 671, 675 (Ark. 2003), ("the Arkansas Civil Rights Act expressly instructs [the Arkansas trial and appellate courts] to look to federal civil-rights law when interpreting the Act.")

The Arkansas Appellate courts may agree with Plaintiff's argument that he is entitled to the discovery sought from Baptist regarding the disciplinary treatment (to include the lack of any discipline at all) with respect to similarly situated white physicians on the medical staff who committed acts and/or omissions worse than those alleged to have been committed by Plaintiff.

During the pending appeal, the Arkansas appellate court(s) may reverse the trial court's discovery order and construe the expressed language contained in *A.C.A. § 16-123-105*© to allow such discovery, particularly when construed and considered along with the expressed language contained in *A.C.A. § 16-46-105(b)(2)*, which provides that, "nothing in this section shall be construed to prevent discovery and admissibility if the ***legal action*** in which such data is sought is brought by a medical practitioner who has been subjected to censure or disciplinary action by such agency or committee or by a hospital medical staff or governing board." (Emphasis Added). "In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible. ... Additionally, statutes relating to

the same subject are said to be in pari materia and should be read in a harmonious manner, if possible." Arkansas Dept. Of Parks & Tourism v. Jeske, 229 S.W.3d 23, 27, 365 Ark. 279, __ (Ark. 2006).

See also Turner v. Northwest Ark. Neurosurgery, 133 S.W.3d 417, 423-425 (Ark. App. 2003),[32] ("Permissible discovery necessarily revolves around the cause of action alleged by the plaintiff, and from this cause of action, the trial court must fashion its rulings on discovery.") and Dodson v. Allstate Insurance Co., 47 S.W.3d 866, ___ Ark. 2001).("To understand the relevancy of requested discovery, one must understand the elements and nature of the cause of action alleged.")

Given the impact that the lack of discovery obviously had on Plaintiff's ability to respond to the Baptist defendants' motions for summary judgment,[33] and the state trial court's failure to comply with the Arkansas Supreme Court's directives[34] regarding the

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[32] As pointed out by the Arkansas Court of Appeals in Turner, supra, at 424, "[o]ne of the purposes of discovery procedures is to provide a device for ascertaining not only the facts, but information as to the existence or whereabouts of facts relative to the basic issues between the parties; this permits a litigant to secure the type of information that may lead to the production of other relevant evidence or that will facilitate his preparation for trial."

[33] The Arkansas Supreme Court has made it clear that, "before being required to fully demonstrate that evidence in response to a motion for summary judgment a plaintiff is entitled to have the benefit of adequate discovery from the opposing parties as the nature of the case requires." First National Bank v. Newport Hospital and Clinic, Inc., 663 S.W.2d 742, 744, 281 Ark. 332, 335-336 (1984).

[34] See Alexander v. E. Tank Services, Inc., 2016 Ark. App. 185 (Ark. App. 2016), ("Our Supreme Court has additionally made it clear that, even in summary judgment cases, the circuit court must

evaluation of discrimination claims when granting summary judgment to the Baptist defendants, the Arkansas Courts of Appeal may reverse the trial court's discovery orders and summary judgment orders on appeal, thereby also calling into question the district court's order entered in this case dismissing the Baptist defendants on the grounds of res judicata. Therefore, the district court should have abstained. See Beavers v. Arkansas State Bd. of Dental Examiners, 151 F.3d 838, 841 (8th Cir. 1988),

Even though the medical cases were remanded to the Medical Board for possible disciplinary action in the future, in addition to being without an Arkansas medical license from April, 2014 to December, 2015, Plaintiff's liberty[35] interests in his Arkansas medical license and his professional reputation[36] has suffered damages as a result of the April, 2014 revocation notwithstanding the reinstatement of his license and the Medical Board's concession that the Consent Order

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evaluate employment-discrimination cases using the McDonnell Douglas framework and that it must explain its findings.") See also Brodie v. City of Jonesboro, 2012 Ark. 5 (Ark. 2012).

[35] See Winegar v. Des Moines Independent Community School District, 20 F.3d 895,899 (8th Cir. 1994), ("An employee's liberty interests are implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges.")

[36] "Under Arkansas law, several types of statements are deemed defamatory per se not only in very old cases, but also in some relatively recent decisions. These include charges of criminal activity, adultery, 'contagious distemper,' or dishonest, as well as any charge which injures the plaintiff in his or her trade, business, or profession." Ewing v. Cargill, Inc., 919 S.W.2d 507, 508 (Ark., 1996).

was not considered to be a "restriction."[37] Given the issues of first impression and/or statutory construction[38] under Arkansas state law that may be decided during the pending appeal of Plaintiff's state court action, the district court should have stayed, instead of dismissed Plaintiff's action here. See Doe v. McCulloch, *supra*, at 835 F. 3d 788-789, and Bob's Home Service, Inc. v. Warren County, 755 F.2d 625, 628 (8th Cir. 1984).

Conclusion

In light of the forgoing, the district court's orders granting the defendants' motions to dismiss and motions for summary judgment should be reversed.

Respectfully submitted, this 23rd day of August 2018.

By: s/s Eric E. Wyatt, Esq.
Eric E. Wyatt
Georgia Bar No. 778955
George W. McGriff_
Georgia Bar No.: 493225

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[37] See Complaint, ¶s 91-92, (APP. 50, 51). See also (APP. 442), to include FN10, ("on February 2, 2017, just days before the trial in state court was to be begin, and where Board agents, employees, and/or representatives had been subpoenaed to testify, "the Board voted unanimously to amend Dr. Williams' Consent Order of October 19, 2015 to add a statement that the action ***was not considered a restriction*** of his Arkansas medical license.") See also (APP. 653, 871, 1064-1066, 1082-1084, 3205-3209, 3369-3372, 3532-3533, 3739, 4138-4139, and 5139).

[38] In addition to *A.C.A. § 16-46-105*, Plaintiff's state court appeal may also involve statutory construction of the Arkansas Civil Rights Act as well as other Arkansas statutes, including, *A.C.A. §§ 20-9- 502*, *20-9-503*, *17-1-102* and *16-7-202*.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

VICTOR BERNARD WILLIAMS, M.D. Plaintiff, v. BAPTIST HEALTH d/b/a BAPTIST HEALTH MEDICAL CENTER; DOUGLAS WEEKS, Indiv., and in his Official Capacity as Sr. Vice-President and Administrator; EVERETT TUCKER, M.D., Indiv., and in his Official Capacity as a Member of the Credentials Committee; TIM BURSON, M.D., Indiv., and in his Official Capacity as Chief of Surgery and Chairperson of the Surgery Control Committee; SCOTT MAROTTI, M.D., Indiv., and in his Official Capacity as a Member of the Surgery Control Committee; SUSAN KEATHLEY, M.D., Indiv., and as Chairperson of the Credentials Committee; CHRIS CATE, M.D., Indiv., and as Chairman of the	*	March 31, 2017 - Case 4:17-cv-00205-JM CIVIL ACTION FILE NO.:

Executive Committee and	*
Chief of Staff; THE	*
SURGICAL CLINIC OF	*
CENTRAL ARKANSAS;	*
JOHN E. HEARNSBERGER	*
II, M.D., Indiv.; JOSEPH M.	*
BECK, II, Indiv., CHARLES	**
MABRY, M.D., Indiv.; and	*
JAMES, COUNCE, M.D.;	*
Indiv.	

Defendants.

INTRODUCTION

COMES NOW, VICTOR BERNARD WILLIAMS, M.D., Plaintiff in the above-styled action, by and through counsel, and files this, his Complaint, pursuant to, and within the time allowed by the Fourteenth Amendment of the United States Constitution *42 U.S. C §§ 1981, 1982, 1983, 1985(2)(3)* and *1988* against the named and unnamed defendants for declaratory relief, injunctive relief and for damages to redress deprivation of rights secured to Plaintiff under the referenced federal statutes and the Constitution of the Unites States of America.

JURISDICTION

1.

This Court has original jurisdiction over this action pursuant to *28 U.S.C. § 1331* for the federal claims referenced above, and for all injuries suffered as a result of the revocation of his Arkansas State medical

license in April 2014. Further, pursuant to *28 U.S.C. § 1367* this court has supplemental jurisdiction over Plaintiff's supplemental state law claims arising out of the same facts, acts, omissions, and/or transaction at issue regarding his federal claims, which arose when his medical staff privileges were revoked in April 2014.

2.

On February 28, 2017, Plaintiff suffered a defense verdict after a four-day bench trial on one count (failure to follow bylaws) of thirteen counts[1] brought by Plaintiff against Baptist Health Medical Center, the Arkansas State Medical Board and various defendants. To date, a written order has not yet been entered but Plaintiff expects that an appeal of the defense verdict is likely. However, as the material facts, including the revocation of his medical license took place subsequent to the filing of his state law complaint on February 25, 2014 [Pulaski Circuit Court, *Civil Action No. 60-CV-14-808*], throughout the state law litigation Plaintiff made it clear that he was not placing before the trial court any claims arising after he filed his lawsuit on February 25, 2014. "It is well settled that claim preclusion does not apply to claims that did not arise until ***after*** the first suit was filed." The Baker Group, L.C. v. Burlington Northern and Santa Fe Railway Co., 228 F.3d 883, 886 (8th Cir. 2000). See also Lundquist v. Rice Memorial Hospital, 238 F.3d 975, 977 (8th Cir. 2001), ("Claim preclusion, however, does not apply to claims that did not exist when the first suit was filed.")

3.

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[1] The trial court had entered summary judgment on the other twelve counts of the Complaint prior to the bench trial.

Of particular note, even though he brought state law claims pursuant to the Arkansas Civil Rights Act, due to Plaintiff's inability to engage in any pre trial discovery regarding the peer review process and/or complete lack of peer review proceedings initiated against other, similarly situated physicians on the medical staff at Baptist Health Medical Center,[2] Plaintiff expressly argued in opposition to the various motions for summary judgment that, "claims (arising under federal and/or state law, the precise nature of which have not yet been determined) related to the April 2014 revocation of Plaintiff's medical license are not at issue in this case [Pulaski Circuit Court, *Civil Action No. 60-CV-14-808*], as they arose subsequent to the filing of the above-styled case [Pulaski Circuit Court, *Civil Action No. 60-CV-14-808*]."

BACKGROUND INFORMATION

4.

Plaintiff Victor Bernard Williams, M.D., is a Black male physician, and naturally born American citizen, who was educated by State of Arkansas Schools, including the University of Arkansas Medical School. After graduation from the University of Arkansas for Medical Sciences, Plaintiff Victor Bernard Williams, was and has been duly licensed to practice medicine under the laws of the State of Arkansas since

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[2] At issue in the appeal of February 25, 2014 [Pulaski Circuit Court, *Civil Action No. 60-CV-14-808*], will be whether or not the trial court properly applied the Arkansas peer review statute to preclude discovery of any information related to whether or not peer review proceedings were held and/or should have been held with respect to acts and/or omissions committed by other physicians on the medical staff at Baptist Health Medical Center.

October 8,1999. Plaintiff is a specialist, practicing in the area of cardiothoracic, vascular and general surgery. After graduating from the University of Arkansas for Medical Sciences, Dr. Williams completed a five (5) year residency in General surgery and a three (3) year Fellowship in Cardiothoracic surgery.

5.

Plaintiff became board certified in General Surgery in February 2003 and was last re-certified in December 2012. Plaintiff was also certified by the American Board of Thoracic Surgery in 2005, and re-certified in 2016. Each time Plaintiff has been required to take his board examinations in order to maintain his board certifications and/or to become re-certified in General Surgery and Thoracic Surgery, he has done so and he passed his boards, the most recent time in 2016.

6.

From the time that the Plaintiff was on the medical staff at Baptist Health d/b/a Baptist Health Medical Center, due to hard work and the providing of good medical care to the referring physicians' patients, he has completed thousands of general, cardiac, thoracic and vascular surgery cases at Defendant Baptist Hospital and other hospitals in the State of Arkansas.

PARTIES

7.

VICTOR BERNARD WILLIAMS, M.D., is a Black physician with his principal place of business at 9712 West Markham, Little Rock, County of Pulaski, Arkansas 72205.

8.

Defendant, Baptist Health d/b/a Baptist Health Medical Center is a private, not for profit hospital in Little Rock, Arkansas governed by a Board of Directors of Baptist Health d/b/a Baptist Health Medical Center. Defendant, Baptist Health d/b/a Baptist Health Medical Center, may be served by delivering a copy of the Complaint and Summons to its registered agent, Russell D. Harrington, 9601 Interstate 630, Exit 7, Little Rock, Arkansas 72205.

9.

Defendant Douglas Weeks, at all times relevant hereto, was the Sr. Vice-President and the Administrator of Baptist Health d/b/a Baptist Health Medical Center. As such, he is sued individually, and in his official capacity as the Administrator of Baptist Health Medical Center. He is subject to the jurisdiction and venue of this Court and may be personally served at 9601 Interstate 630, Exit 7, Little Rock, Arkansas 72205.

10.

Defendant Surgical Clinic of Central Arkansas and Baptist Health Medical Center engaged in a joint venture outpatient surgery center ("The Pavilion") that is located on the first floor in the Hickingbotham Building of the Baptist Health Medical Center, Little Rock campus. As such, this Defendant was biased and stood to gain financially from the adverse actions taken against Plaintiff. Defendant Weeks was involved in setting up the joint venture, and at all times relevant hereto was a member of the board of the Surgical Clinic of Central Arkansas, and was biased along with Defendant Everett Tucker. Defendant may be served

by serving its registered agent, Chris M Cate M.D., at 9500 Kanis Road, Suite 501, Little Rock, Arkansas 72205.

11.

Defendant, Everett Tucker, M.D., is a General Surgeon who, at all times material to the allegations in this Complaint, was a board member of the Surgical Clinic of Central Arkansas, and was also a general surgeon engaged in the practice of medicine in the Little Rock, Arkansas Pulaski County area. As such, he was biased, and he stood to gain professionally from the adverse actions taken against Plaintiff. He is sued individually, and in his Official Capacity as a Member of the Credentials Committee at Baptist Health Medical Center. He is subject to the jurisdiction and venue of this Court and may be served at the Surgical Clinic of Central Arkansas, Suite 501, 9500 Kanis Rd., Little Rock, AR 72205.

12.

Defendant Tim Burson, M.D., is a physician neurosurgeon and became Chief of Surgery in January 2010. Defendant Tim Burson, M.D., was at all times material to the allegations in this Complaint engaged in the practice of medicine in the Little Rock, Arkansas Pulaski County Area. He is sued individually and in his Official Capacity as an officer and/or agent of Baptist Health Medical Center. During the time period relevant to the adverse actions taken against Plaintiff, Defendant Tim Burson, M.D. was Chief of Surgery and Chairperson of the Surgery Control Committee of

Baptist Health Medical Center.[3] As such, when acting in these capacities, Defendant Tim Burson, M.D. is/was authorized to act on behalf of the medical staff at Baptist Health Medical Center. He is subject to the jurisdiction and venue of this Court and may be served at his office located on the Baptist Medical Center campus at Medical Towers I Building, Suite 310, 9601 Baptist Health Dr., Little Rock, AR 72205.

13.

Defendant Scott Marotti, M.D., a member of the Surgery Control Committee, is a general surgeon and a direct competitor of Plaintiff Dr. Williams. At all times relevant hereto, he was also a member of the Surgical Clinic of Central Arkansas, and was biased and stood to gain professionally from the adverse actions taken against Plaintiff. Defendant Scott Marotti, M.D. is subject to the jurisdiction and venue of this Court and may be served at the Surgical Clinic of Central Arkansas, Suite 501, 9500 Kanis Rd., Little Rock, AR 72205.

14.

Defendant, Susan Keathley, M.D., is a pediatric physician who, at all times material to the allegations in

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[3] The Surgical Control Committee of Baptist Health Medical Center consists of physician staff members at Baptist Health Medical Center, who are elective or specified representatives of the Medical Staff, and who are authorized to act on behalf of the medical staff at Baptist Health Medical Center. The members of the Surgical Control Committee who are also named defendants in this action, and who are all white males, were also surgeons and direct economic competitors of Plaintiff. In addition to these defendant surgeons, all of the other members of the Surgery Control Committee of Baptist Health Medical Center are White males.

this Complaint, was engaged in the practice of medicine in the Little Rock, Arkansas Pulaski County Area. She is sued individually, and in her Official Capacity as Chairperson of the Credentials Committee at Baptist Health Medical Center. She is subject to the jurisdiction and venue of this Court and may be served at 2218 Walnut Grove Rd., Little Rock, AR 72223.

15.

Defendant, Chris Cate, M.D., Chairman of the Executive Committee and Chief of Staff at Baptist Health Medical Center, at all times material to the allegations in this Complaint, was engaged in the practice of medicine in the Little Rock, Arkansas Pulaski County area. Defendant Chris Cate, M.D., as Chairman of the Executive Committee, influenced other members of the Executive Committee due to his bias, and the fact that he stood to gain financially from the adverse actions taken against Plaintiff as a member of the Surgical Clinic of Central Arkansas. As such, he was directly involved with Defendants Burson, Tucker and the other named Defendants in discriminatory acts and conduct that harmed the Plaintiff. He is sued individually, and in his Official Capacity as Chairman of the Executive Committee and Chief of Staff at Baptist Health Medical Center. He is subject to the jurisdiction and venue of this Court and may be personally served at the Surgical Clinic of Central Arkansas, Suite 501, 9500 Kanis Rd., Little Rock, AR 72205.

16.

Defendant John E. Hearnsberger II, M.D., who, with respect to the allegations raised herein, acted maliciously, outside the scope of his lawful authority, as a member of Defendant Arkansas State Medical Board,

and is being sued individually and in personal capacity, while acting under color of authority of state law while committing the tortious conduct alleged herein. Defendant John E. Hearnsberger II, M. D, is subject to the jurisdiction and venue of this Court and may be served by delivering a copy of the Summons and Complaint to John E. Hearnsberger, II, M.D., at 132 Medical Circle, Site 200, Nashville, Arkansas 71852.

17.

At all times material to the allegations of this Complaint, Defendant Joseph M. Beck, II, M.D., acted maliciously, and served as the Chairman and/or President of the Arkansas State Medical Board while acting under color of authority of state law, even though the unlawful, tortious conduct he engaged in was outside the scope of his lawful authority. As such, he is sued individually, in his personal capacity. He is subject to the jurisdiction and venue of this Court, and may be served at 500 S. University Ave., Little Rock, AR 72205.

18.

Defendant Charles Mabry, M.D., at all times relevant to the allegations of this Complaint, was a general surgeon who agreed with the defendants to provide a medical opinion that would be used to revoke Plaintiff's medical staff privileges in the event that Plaintiff failed to voluntarily abandon his claims of racial discrimination against Baptist Health Medical Center. He is subject to the jurisdiction and venue of the Court, and may be served at 1801 W. 40th Ave., Suite 7B, Pine Bluff, AR 71603.

19.

Defendant James, Counce, M.D., at all times relevant to the allegations of this Complaint, was a general surgeon who agreed with the defendants to provide a medical opinion that would be used to revoke Plaintiff's medical staff privileges in the event that Plaintiff failed to voluntarily abandon his claims of racial discrimination against Baptist Health Medical Center. He is subject to the jurisdiction and venue of the Court, and may be served at 3276 Northhills Blvd., Fayetteville, AR 72703.

FACTS RELEVANT TO ALL COUNTS

20.

On November 25, 2003, Plaintiff was first granted medical staff privileges at Baptist Health Medical Center, Little Rock for the two year time period November 2003 through November 2005. At the time that he obtained medical staff privileges at Baptist Health Medical Center, Plaintiff was the only African-American surgeon in Little Rock, Arkansas, who provided both the range and the type of surgeries to patients in and around Pulaski County, Arkansas, in the areas of general, cardiac, thoracic and vascular surgery.

21.

On September 26, 2005, Plaintiff submitted his first application for reappointment of his medical staff privileges at Baptist Health Medical Center, Little Rock. On February 27, 2006, Plaintiff was notified that his application for reappointment had been granted, and that his clinical privileges had been approved for an additional (second) two year period.

22.

On November 8, 2007, Plaintiff submitted his

second application for reappointment of his medical staff privileges at Baptist Health Medical Center, Little Rock. On March, 20, 2008, Plaintiff was notified that his application for reappointment had been granted, and that his clinical privileges had been approved for an additional (third) two year period.

23.

In November 2008, Plaintiff purchased a parcel of real property located at 9712 W. Markham St., Little Rock, Arkansas for the purpose of constructing a medical office to provide treatment for his surgical patients, to include those patients that he treated at Baptist Health Medical Center, Little Rock.

24.

On November 3, 2009, Plaintiff submitted his third application for reappointment of his medical staff privileges at Baptist Health Medical Center, Little Rock.

25.

In the fall of 2009, Plaintiff completed the build out process for his medical office located at 9712 W. Markham St., Little Rock, Arkansas, and began advertising the same to inform patients, both current and potential, that he would begin servicing and treating patients there.

26.

At the time that Plaintiff applied to renew his medical staff privileges at Baptist Health Medical Center, Little Rock, in the fall of 2009, he had no reports of medical malpractice payments, no reports of state licensure actions, no reports of exclusions or

debarment actions, no reports of clinical privileges actions, no reports of professional society actions, and no reports of DEA/Federal licensure actions. As they had done with respect to each previous time that they had processed Plaintiff's application and/or re-application for privileges, employees, agents and/or representatives of Baptist Health Medical Center obtained and verified this information by submitting a query to the National Practitioner Data Bank on December 15, 2009. Even though Plaintiff is/was Board Certified in cardiothoracic and general surgery, as his surgical practice continued to grow in 2009, he performed more and more general surgery procedures leading to professional hostility from his white surgical competitors on the medical staff at Baptist Medical Center, particularly those who belonged to the surgical group,

27.

At some point prior to the fall of 2009, Baptist Health entered into a joint venture with the Surgical Clinic of Central Arkansas to operate a for profit outpatient surgery center (The Pavilion) located on the Baptist Health Medical Center, Little Rock campus, whereby the two entities shared profits on an equal basis. For surgical procedures performed at The Pavillion by the Surgical Clinic of Central Arkansas, with respect to revenue that is earned, there is both a facility fee, and a surgery fee. The facility fee is split between the members of the joint venture, Surgical Clinic of Central Arkansas, and Multi Management Services, a for profit subsidiary of Baptist Health, with each receiving fifty percent.

28.

The defendants, to include Weeks and Tucker, felt that Plaintiff was planning to start up a clinic on his commercial property located at 9712 W. Markham Street, Little Rock Arkansas during the time period when Plaintiff completed the build out process in the fall of 2009. Based upon their racial animus toward Plaintiff, the defendants, to include Weeks and Tucker, felt that Plaintiff's general surgery practice was growing too rapidly, and that as a Black general, vascular, and cardiothoracic surgeon, Plaintiff and his surgical practice would take away from the revenues generated by the Surgical Clinic of Central Arkansas. This is particularly true given the significant number of Black patients who had been treated by Plaintiff prior to the opening of his medical office on West Markham Street, in Little Rock, Arkansas in the fall of 2009.

29.

According to reports generated during Plaintiff's 2009 credentialing re-application process, it was documented that during the one year period September 1, 2008, through August 31, 2009, Plaintiff had performed over 550 surgical procedures at Baptist Health Medical Center, Little Rock. As Chief of the Department of Surgery, Defendant Burson became aware of the number of surgical procedures performed by Plaintiff when he approved Plaintiff's re-credentialing application packet in January 2010. This information, along with the other information gathered during Plaintiff's re- credentialing process, was communicated to the other defendants, including Weeks and Tucker.

30.

On February 5, 2010, Defendants Weeks and

Burson met with Plaintiff and attempted to coerce him into voluntarily resigning his medical staff privileges because they knew that there was no sufficient basis to deny his application for re-credentialing,[4] even though on February 5, 2010 there had apparently been a decision made that Plaintiff's medical staff privileges were going to be terminated. The decision to terminate Plaintiff's medical staff privileges was based on his race, Black, and the race (Black) of a significant number of Plaintiff's surgical patients. During this meeting, Weeks told Plaintiff that if he didn't resign, he would receive, "the harshest penalty possible." Burson stated to Plaintiff that he should, "go ahead and resign," and that he would be, "back on staff" within days.

31.

After thinking about it for a couple of days, Plaintiff wrote Weeks on February 8, 2010 and informed him that he was not going to voluntarily resign, especially since Weeks and Burson had failed to give him a factual basis that would support the termination of his medical staff privileges. When Plaintiff notified Weeks of his decision not to voluntarily resign, the hospital defendants, to include Weeks, Burson, Marotti, Keathley, Tucker and Cate entered into an agreement that they would cause Plaintiff's Baptist Health Medical Center medical staff privileges to be revoked and terminated, and that they

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[4] Plaintiff had obtained a letter from Defendant Marotti, acting in his capacity as Chairman of the Department of Surgery, dated November 27, 2009, after having attended a meeting with the Marotti and the Surgery Control Committee on November 16, 2009 regarding patient care. Defendant Marotti's letter provided that, "it was the decision of the committee that no action is necessary based on the information that you supplied."

would then report to the Arkansas State Medical Board and the National Practitioner Data Bank that Plaintiff had committed acts which constitute, "poor preoperative judgment, poor medical decision-making, poor technical ability, an inability to recognize post-operative complications, lack of timely follow-up, and lack of responsiveness to patients."

32.

Because on February 5, 2010, he had no factual basis to support their attempt to force Plaintiff to voluntarily resign his medical staff privileges, Defendant Weeks used the employees, agents, and representatives of Baptist Health to perform a look back and/or search through all of Plaintiff's patient's charts immediately after the receiving Plaintiff's February 8, 2010, letter. The search through Plaintiff's patients' medical records was done in an effort to cover up the true motive, racial discrimination, as the decision had already been made to terminate Plaintiff's medical staff privileges, not because of his competency or performance, but because of his race, Black, and in an effort to curtail Plaintiff's Black patient base in the Little Rock, Arkansas area. The employees, agents, and/or representatives of Baptist Health Medical Center had to search back through Plaintiff's patient charts as far back as over one year (February 2009),[5] in order to locate facts which they thought could be used in order to raise purported "concerns" about Plaintiff's medical judgment, technical ability, and responsiveness

[5] The patient that was treated by Plaintiff in February and March 2009 was the one that the defendants chose to have reviewed by Defendant Mabry at the request of the Arkansas State Medical Board.

to patients, notwithstanding that these cases should have already been reviewed under the hospital's normal credentialing and quality assurance policies and procedures. See Tactics Characteristic of Sham Peer Review, *Journal of American Physicians and Surgeons*, Volume 14, Number 3, Fall 2009, wherein it is provided in relevant part, "[a]lthough the numerator-without-denominator tactic can be used against any physician, it is most commonly used against surgeons. Hospitals that use this tactic typically select cases that are specifically designed to highlight complications or negative outcomes. The selection of cases often falls outside the routine protocol used for selecting cases for review of physicians practicing at the hospital. The hospital then presents this select group of cases to peer reviewers as evidence that the targeted physician is a bad doctor or provides unsafe care. Hospitals that use this tactic specifically omit the denominator (how many cases of that type the physician has performed over a period of time), thus eliminating the possibility of calculating a complication rate that could be used to make a fair comparison with statistics of other colleagues, or statistics published in medical literature. Virtually all surgeons, of course, experience complications, and the only surgeons who have zero complications are those who do not perform surgery, or who do not report their complications."

33.

The fact that the hospital defendants went outside of the routine protocol utilized by the hospital to review other physicians on the medical staff is easily established in this case because unbeknownst to Defendant Weeks, Plaintiff's application for re-credentialing was already pending when the conspiracy

to terminate his medical staff privileges on the basis of his race commenced. Just days before the February 5, 2010 meeting wherein Plaintiff was asked by Weeks and Burson to voluntarily resign his medical staff privileges, Defendant Burson, acting in his capacity as Chief of the Department of Surgery, had just signed Plaintiff's application for re-credentialing (on January 18, 2010), where he recommended that Plaintiff's application for reappointment to the medical staff be approved, and where he further expressly attested that:

> ***I have reviewed this Application for Reappointment and supporting documentation. I have knowledge of this Applicant's clinical judgment and technical skills and I believe this Applicant is competent to perform the clinical privileges requested, including clinical privileges for performing high-risk procedures and treating high-risk conditions.***

34.

Yet, on March 23, 2010, Defendant Burson wrote Plaintiff and informed him that on March 15, 2010, the Surgical Control Committee had met, discussed and reviewed eleven cases (from five different patients),[6]

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[6] With respect to one of the patients, after Plaintiff explained that he had already met with the Surgical Control Committee to discuss this case in November, 2009, allegations surrounding the patient were dropped. With respect to the medical treatment provided to three of the four remaining patients at issue, the medical treatment provided had occurred several months prior to Burson's approval of Plaintiff's application for re-credentialing on January

where Plaintiff was the operating surgeon without first inviting Plaintiff to attend the meeting. This meeting, if it occurred,[7] was in violation of the Baptist Health Medical Center's Bylaws of the Professional Staff, Section 13.8.2.1, which provides that, "A Practitioner whose patient's clinical course is scheduled for discussion at a committee, clinical department or ancillary service meeting shall be so notified and shall be expected to attend such meeting. Whenever apparent or suspected deviation from standard clinical practice is involved, the notice to the Practitioner shall so state, shall be given by certified mail, return receipt requested, and shall include a statement that his attendance at the meeting at which the alleged deviation is to be discussed is mandatory."

35.

Burson's March 23, 2010, letter requested that Plaintiff appear on April 5, 2010 at 5:00 p.m. in the Baptist Health Medical Center's Administrative conference room to discuss the cases. Since Burson and Weeks already knew that Plaintiff's medical staff privileges would be terminated, they scheduled the

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18, 2010. Moreover, none of the medical treatment provided to the patients at issue arose from the same surgical procedures and/or complications of surgery as one of the other patients. In addition, the Board of Trustees approved Plaintiff's application for re-credentialing on February 25, 2010, after the Credentials Committee had recommended the same on January 20, 2010.

[7] Inconsistent with the expressed language contained in the medical staff bylaws that requires that permanent minutes signed by the presiding officer be kept and maintained reflecting the vote taken on each matter, there has never been any minutes of this meeting produced during discovery in Pulaski Superior Court *Civil Action No. 60CV-14-808* or otherwise, despite several requests by Plaintiff and a motion to compel seeking the same.

meeting or "interview" in order to seemingly comply with the requirements of the medical staff bylaws, but they agreed to only give Plaintiff the identities of the patients, and to not inform him of the nature of the suspected deviation from the appropriate standard of care. This was intentionally done for several reasons. One, so that it would be more difficult for Plaintiff to defend against the charges being made against him. Two, so that they could later maintain that termination of Plaintiff's medical staff privileges was warranted in lieu of less severe forms of corrective action given to other, similarly situated white physicians on the medical staff who had committed far worse acts and/or omissions than those alleged to have been committed by Plaintiff because without prior knowledge of the alleged deviations from the applicable standard of care, it would be more likely that Plaintiff would state at the April 5,2010, "informal" interview that he would, "stick by what he did."

36.

On March 29, 2010, because he had already been told by Weeks on February 5, 2010 that if he didn't voluntarily resign he would receive the "harshest penalty possible," and because he was unaware of the general nature of the factual allegations against him, Plaintiff wrote Burson in response to his March 23, 2010, letter in relevant part as follows: "Would you please advise me in each of the five identified cases of each apparent or suspected deviation from the standard of care? Would you also identify in each case whether the apparent or suspected deviations is one of surgical judgment, both preoperative and postoperative, technical abilities, or lack of responsiveness in emergency situations. This information should help me

to fully address the concerns of the committee."

37.

On March 31, 2010, Burson responded to Plaintiff's March 29, 2010 letter and in relevant part stated that, "The Surgical Control Committee spent a good deal of time considering whether to list specific questions on each patient in our letter of March 23, 2010," and that, "the Committee felt that the general areas listed as concerns applied to greater or lesser degree in each case." In concluding his letter where, Burson stated that, "the Committee respectfully declines to list specific questions for each case."

38.

On April 1, 2010, Plaintiff wrote Burson in response and asked that he "at least [be] provided a copy of committee meeting minutes so that I may fully answer all questions," and that, "[i]f your decision is unchanged, then I request a rescheduling of the hearing from April 5th for 10 days to allow me adequate time to fully review each chart in preparation of the hearing." Because he felt that he was being discriminated against, Plaintiff also requested permission to have a court reporter present during the scheduled interview.

39.

Meanwhile, on April 1, 2010, Rebecca Cunningham wrote Plaintiff a letter informing him that his reappointment application to the Baptist Health Professional Staff had been approved for an additional (fourth) two year period effective March 2010 through March 2012.

40.

On April 5, 2010, when responding to Plaintiff's request to have a court report attend the rescheduled (April 12, 2010) meeting at Plaintiff's expense, Burson responded that, "we have never allowed recordings of these meetings or the presence of a court reporter. In addition, the Control Committee cannot take any formal action regarding a physician's privileges."

41.

When he participated in the interview before the Surgery Control Committee on April 12, 2010, Plaintiff had not been given any information before hand on the nature of the alleged deviations from the appropriate standard of care and he did not have the opportunity to refute any specific allegations that were later made against him as he was not allowed to bring counsel, and there were no witnesses present who testified against him. During the April 12, 2010, interview, the members of the Surgery Control Committee did not express any specific concerns and/or attempt to inform Plaintiff of the alleged deviations from any applicable standard of care. Further, at not time during the April 12, 2010, interview, did anyone on the Surgery Control Committee articulate to Plaintiff the alleged deviations from standards of care at issue, even though at the conclusion of the interview they recommended to the Credentials Committee that corrective action be taken against Plaintiff.[8] Unbeknownst to Plaintiff at the time, because the decision to terminate his medical staff privileges had already been made, the ulterior motive for having Plaintiff attend the interview with the

[8] Defendant Weeks participated in the interview with the Surgery Control Committee, and immediately notified Plaintiff following the meeting that corrective action was being recommended.

Surgery Control Committee was for the hospital defendants to question Plaintiff in an effort to obtain information required for the preparation of a script of rhetorical questions that could be posed to Plaintiff at a subsequent hearing (April 21, 2010) before the Credentials Committee.

42.

On April 21, 2010, Defendant Keathley, acting in her capacity as Chairperson of the Credentials Committee, along with Defendant Tucker, who was the only general surgeon on the Credentials Committee, used the script that was prepared after Plaintiff's interview with the Surgery Control Committee to cause the Credentials Committee to agree with the Surgery Control Committee's recommendation for corrective action, and made a recommendation to terminate Plaintiff's medical staff privileges, rendering him unable to continue to provide medical services at Baptist Hospital from that date forward. Tucker didn't review the medical charts at issue before the proceedings before the Credentials Committee and he merely propounded the questions to Plaintiff that were contained in the typewritten notes that had been given to him and Defendant Keathley to use during the proceedings. As a member of the Surgical Clinic of Central Arkansas, Tucker, who was the only general surgeon on the Credentials Committee, was personally biased against Plaintiff and stood to gain financially by recommending to the other members of the Credentials Committee that Plaintiff's medical staff privileges be revoked.

43.

Plaintiff was discriminated against on the basis of his race, Black, during the entire course of the

disciplinary proceedings commenced against him which led to the termination of his medical staff privileges at Baptist Health Medical Center, Little Rock. The hospital defendants actions were knowingly discriminatory, arbitrary and capricious, as the hospital defendants maliciously, and intentionally treated Plaintiff differently than similarly situated physicians who had committed acts and/or omissions far worse than those alleged to have been committed by Plaintiff, as no other surgeon or physician had been disciplined in the manner in which Plaintiff was even though it was common knowledge that several white, similarly situated physicians, to include other surgeons on the medical staff, had engaged in conduct far worse than the allegations against Plaintiff even though no disciplinary actions at all had been taken against them.

44.

After his medical staff privileges were revoked in April 2010, Plaintiff immediately pursued the appeal process authorized pursuant to the Baptist Health Medical Center's medical staff bylaws. Attorney Gene McKissic notified defendant Weeks via letter dated May 14, 2010, that he would be representing Plaintiff during the appellate process at Baptist Health Medical Center.

45.

At the time that Plaintiffs medical staff privileges were terminated by Baptist Hospital in April 2010, there had not been a complaint[9] filed with the

[9] The customary practice at the Arkansas State Medical Board is to promptly give the physician notice and the opportunity to respond to any such complaints immediately after they are received.

Arkansas State Medical Board against Plaintiff by any patient and/or person related to the four cases that were at issue at the hospital.

46.

McKissic formally filed a notice of appeal of the Credentials Committee's recommendation on May 25, 2010, and included in the notice of appeal to Baptist Health, a statement that Plaintiff believed that the actions taken against him were "racially biased and discriminatory," and that white physicians at Baptist Health Medical Center who had been subject to corrective action had not "received such severe punishment."

47.

At some time on or before October 19, 2010, employees, agents and/or representatives of the Arkansas State Medical Board had obtained copies of the medical records of the four patients at issue during the appellate process at Baptist Hospital related to the termination and/or revocation of Plaintiff's medical staff privileges. When the Medical Board first obtained the medical records of the patients that were used by Baptist hospital to terminate Plaintiff's medical staff privileges, Plaintiff had not yet exhausted the appeal rights that he had available at Baptist Hospital pursuant to the medical staff bylaws.

48.

The Medical Board's policy and customary practice had always been to await the outcome of any appeals and/or litigation related to medical treatment provided by a physician prior to any formal action being taken by the Board. However, because of their prior and current relationships with Defendant Baptist

Health Medical Center, Defendants Hearnsberger and Beck knew and agreed with the other defendants that they would utilize their positions with the Arkansas State Medical Board to cause injury to Plaintiff, to include revoking his medical license, if necessary, in order to help Baptist Health Medical Center defend against Plaintiff's claims of racial discrimination.

49.

On or about November 12, 2010, without first having received a patient complaint (as customarily required under the Board's policies) from any person, agents, employees and/or representatives acting pursuant to authority conferred by the Arkansas State Medical Board,[10] obtained and sent the medical records of Plaintiffs' patients that had been purportedly used by Baptist Hospital to terminate the Plaintiffs' medical staff privileges to two outside reviewers. As Chairman, Defendant Beck condoned and/or ratified the Board's initiation of an unauthorized investigation against Plaintiff even though he knew that it was the Board's policy to wait until the final decision from the hospital and/or the conclusion of any related judicial proceedings before seeking to discipline a physician regarding matters that have been subject to hospital disciplinary proceedings.[11] Defendant Hearnsberger, the only

[10] Upon information and belief, the hospital medical records of Plaintiff s patients were sent to Counce and Mabry by Ms. Peggy Cryer, Executive Secretary of the Arkansas State Medical Board.

[11] Of course the hospital and/or the Arkansas State Medical Board could have sought a summary suspension of Plaintiff's Arkansas Medical License in order to prevent imminent danger to the health or safety of any individual, but neither sought to do so at any time because they would have been required to promptly justify their actions, and they knew that they could not do so.

general surgeon on the Arkansas State Medical Board at the time, and a former member of the Surgery Control Committee at Baptist Medical Center,[12] acted outside the scope of his authority as a medical board member and participated directly in the Board's investigation of Plaintiff, and gathered and provided false, misleading information to the other Board members who were not general surgeons in order to unduly influence their opinion against Plaintiff, and to influence them to vote to take adverse actions against Plaintiff.

50.

One of the reviewers selected, James S. Counce, M.D., was also the partner in a medical practice with one of the State Medical Board members, John B. Weiss, M.D. Counce was asked to provide an expert opinion in general surgery even though neither Counce nor Weiss practiced general surgery. The defendants all knew and agreed, that Counce would give them an opinion that, along with the opinion to be given by Mabry, would be used, if necessary, to revoke Plaintiff's Arkansas Medical License if he continued to pursue and/or did not voluntarily abandon his claims of racial discrimination against Baptist Health Medical Center, its agents, employees, and/or representatives.

51.

The other reviewer who was selected to review the medical records of one of Plaintiff's patients who

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[12] When responding to written discovery in the Pulaski Circuit Court case, Baptist Health Medical Center denied that Hearnsberger had ever served on the Surgery Control Committee but he testified otherwise during his deposition testimony.

had been treated by Plaintiff in February and March of 2009, was Dr. Charles Mabry. Mabry had been trained by Defendant Hearnsberger when Mabry was a junior resident during the time when Hearnsberger was a chief resident at the University of Arkansas medical school. In addition, at the time that he was preparing his expert report regarding medical treatment provided by Plaintiff in November 2010, Mabry was a named defendant in at least two civil actions accusing him of racial discrimination under 42 U.S.C. § 1981 and/or the Arkansas Civil Rights Act. See Davis v. Jefferson Hospital Association, 685 F.3d 675,682 (8th Cir. 2012),[13] and Harper v. Jefferson Hospital Association, 2011 U.S. Dist. LEXIS 58899, (E.D. Ark. 2011). The defendants all knew and agreed, that Mabry would give them an opinion that, along with the opinion to be given by Counce, would be used, if necessary, to revoke Plaintiff's Arkansas Medical License if he continued to pursue and/or did not voluntarily abandon his claims of racial discrimination against Baptist Health Medical Center, its agents, employees, and/or representatives.

52.

When Peggy Cryer, in her capacity as employee of the Arkansas State Medical Board, acting outside the scope of her lawful authority, at the direction of Defendant Beck, as Chairman of the Board, submitted the medical records to Counce and Mabry in November

[13] During the appellate process involving Plaintiff's appearances at Baptist Medical Center in the May, 2010 - April, 2011 time-frame, and in all of Plaintiff s appearances at the Arkansas State Medical Board during the December 2010 - January, 2014 timeframe, Mr. Gene McKissic was Plaintiffs counsel. McKissic was also counsel for the Plaintiff in Davis v. Jefferson Hospital Association, 685 F.3d 675 (8th Cir. 2012).

2010, nearly five months before the hospital's appellate process had run its course, Cryer also sent a transmittal letter to them explaining the negligence standard to be utilized when giving their expert opinion of the records reviewed. The transmittal correspondence sent by Cryer to Mabry and Counce also included a memorandum notifying them of the definitions of the standard ("gross negligence" and "ignorant malpractice") that was to be included in their report because all of the defendants knew that during the hospital disciplinary proceedings, there had been no allegations made that Plaintiff had committed "gross negligence" and/or "ignorant malpractice," which would be a finding necessary before the Board would be lawfully authorized to take any disciplinary action against Plaintiff under the Arkansas Medical Practices Act. The November 12, 2010, transmittal letter sent to Dr. Counce along with medical records requested that the reviews be provided to the Board before November 19, 2010, in time for the December 2010 Medical Board meeting, and informed him that, "we very much appreciate your willingness to work with us to settle this case promptly."

53.

As a result of Plaintiff's meeting with the Medical Board in December 2010 the Medical Board required that he get a proctor[14] for all colon surgery cases that he would perform in the future even though there had never been a hearing noticed against Plaintiff or any findings made against Plaintiff for a violation of the Arkansas Medical Practices Act.

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[14] Accordingly, Plaintiff promptly obtained a board certified proctor (Dr. Carl Gilbert) as directed by the Medical Board.

54.

Immediately after Plaintiff exhausted the appellate process at Baptist Health Medical Center, and after he was notified that a final decision made by the Baptist Health Board of Trustees upholding the termination and revocation of his privileges had been made on April, 12, 2011, Plaintiff filed a civil action (*No. 60CV-11-1990*) in Pulaski County Circuit Court against Baptist Health Medical Center, and others on April 21, 2011, wherein he alleged, among other things, that he had been discriminated against because of his race, Black, in violation of the Arkansas Civil Rights Act of 1993. In addition, Plaintiff also alleged other state law claims including, conspiracy, defamation, tortious interference with contracts, and violations of rights secured by the Arkansas Constitution.

55.

At the time that he served his Complaint on April 21, 2011, (*Civil Action No. 60CV-11-1990*) Plaintiff also served extensive, detailed discovery requests wherein he sought discovery information regarding other similarly situated physicians on the medical staff at Baptist Health Medical Center so that during the litigation of the case, he could easily establish that he had been treated differently with respect to the disciplinary actions taken against him, and/or so that he could establish that the medical staff bylaws were applied to him in a discriminatory manner with respect to the termination of his medical staff privileges.

56.

On June 16, 2011, Peggy Cryer wrote Plaintiff a letter which provided in relevant part as follows:

The Board received notification May 2, 2011 from Baptist affirming their Hearing Committee's recommendation to terminate your staff appointment and clinical privileges.

This letter will confirm the Board's decision and your agreement with the Board at the June 9-10, 2011 meeting appearance regarding this issue wherein you agreed to:

- ***Continue current agreement with the Board regarding colon surgeries wherein you will refrain from performing colon procedures unless assisted by another surgeon pending resolution of your court case;***
- ***Return in one (1) year for an update (June 2012);***
- ***Have a proctor provide quarterly reports to the Board on your procedures.***

57.

On June 17, 2011, a representative of the Arkansas State Medical Board, acting at the direction of Defendant Beck, Chairman, sent the reports generated by Counce and Mabry to Baptist Health Medical Center for its use in *Civil Action No. 60CV-11-1990*. In the transmittal letter, the Board's representative stated that, "Dr. Counts [Counce] and Dr. Mabry do not have to testify or follow-up for further testimony or work concerning these reviews

unless they desire to."

58.

When the Baptist Health Defendants finally responded to Plaintiff's discovery requests in (*Civil Action No. 60CV-11-1990*) on July 14, 2011 after they had been granted an extension of time by Plaintiff, they objected to most of Plaintiff's discovery requests, and failed to respond to interrogatories or produce any information regarding similarly situated physicians on the medical staff. Plaintiff, through counsel, in (*Civil Action No. 60CV-11-1990*) wrote a good faith letter in an attempt to obtain discovery on August 31, 2011, and on September 14, 2011, the Baptist Health Defendants responded indicating that they would "stand by the objections," which were mostly based upon the Arkansas Peer Review Privileges, Arkansas Code §§ 16-46-106 and 20-9-503. Their response also indicated that, "There is no exception under Arkansas law for any type of discrimination [or civil rights] claim in the statutes or case law. The court will have to decide this issue [if Plaintiff wishes to file a motion to compel]."

59.

On October 3, 2011, Dr. Gilbert submitted a report to the Medical Board which stated in relevant part as follows:

> ***I have served as a proctor for Dr. Victor Williams since December 2010. I have proctored him during performance of abdominal colon operations as well as other surgical procedures at his request. I have discussed the cases with him prior to surgical interventions and in the postoperative periods. His knowledge***

base is proficient in the areas of general surgery, and I have found his technical abilities to be proficient as well. I have no concerns regarding his judgment or surgical technique. He has handled patients with multiple complex medical issues well. In summary, his preoperative and postoperative judgment is appropriate and his technical skills are proficient and within the standard of care. For any questions please do not hesitate to contact me.

60.

On November 16, 2011, Plaintiff filed a Motion to Compel in *Civil Action No. 60CV-11-1990.*

61.

On November 22, 2011, the Hospital Defendants filed a motion for partial summary judgment in *Civil Action No. 60CV-11-1990* regarding Plaintiff's Arkansas Constitutional claims, asserting the absence of "state action." On November 30, 2011, the Baptist Health Defendants filed a response to Plaintiff's Motion to Compel in *Civil Action No. 60CV-11-1990.*

62.

On the next day, December 1, 2011, the Arkansas State Medical Board voted to Notice Plaintiff for a disciplinary hearing, even though they had told him previously on June 16, 2011 to "Return in one (1) year for an update (June 2012)," and even though there were no other acts and/or omissions committed by Plaintiff subsequent to June 2011 that would constitute an alleged violation of the Arkansas Medical Practices

Act, i.e., "gross negligence or ignorant malpractice."

63.

After being continued, the hearing was re-scheduled for June 8, 2012, and Plaintiff appeared at the Arkansas State Medical Board on that date, along with counsel, and several witnesses who were going to testify on his behalf. Prior to June 8, 2012, Counce had informed the Board that he could not attend the scheduled hearing on June 8, 2012, but Counce's inability to attend was intentionally withheld from Plaintiff. After Plaintiff arrived for the hearing, along with counsel and several witnesses who were to testify on his behalf, the Board voted to again postpone the hearing and requested that Plaintiff cease to perform any surgical procedures at all until he completed a physician assessment program (PACE) and submit the results to the Board upon completion of the program.

64.

One of the witnesses who appeared with Plaintiff was Dr. Rhonda Tillman, who was a professor of surgery at the University of Arkansas. Tillman had given written expert opinions wherein she opined that Plaintiff had not deviated from the applicable standard of care during the disciplinary proceedings against Plaintiff at Baptist Health Medical Center. In addition to postponing the scheduled hearing because Counce was not in attendance, the Board also refused to go forward with the hearing because the defendants already knew Tillman's opinion, and because she was present to testify, they knew that she would be able to support her written opinion with further testimony during the hearing, as both a surgeon, and as a professor whose job is to teach future surgeons. In

order to attack the weight of her previous written opinions, Defendant Hearnsberger called several of Dr. Williams' former professors, even though making such calls would not be encompassed by his role as a member of the Board who would sit in judgment of Plaintiff with respect to the four cases which were prematurely pending before the Board. Further, contrary to established Board policy with respect to other persons who would be authorized to conduct such investigations, if necessary, Hearnsberger failed to make a record of his communications with these former professors, even though he sent a false, defamatory email memorializing negative comments purportedly made by one of the professors in order to create bias to influence the Board members who were not surgeons.[15] During the entire time period that Hearnsberger had been a member of the Arkansas State Medical Board, he had never called former professors in order to investigate other allegedly incompetent physicians who had appeared before the Board after losing their medical staff privileges at a hospital.

65.

Counsel for Plaintiff made calls to the PACE physician assessment program in San Diego, California that was recommended by the Arkansas Medical Board at the June 8, 2012 meeting. As a result of his making this inquiry, and receiving correspondence regarding the San Diego PACE program, Plaintiff and his counsel became aware that the Board had attempted to create

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[15] One of Plaintiff's former professors, Dr. Eidt, according to Hearnsberger, referred to Plaintiff as "hard-headed and poor resident." This statement is/was false, as Plaintiff's student file at the University of Arkansas contains a favorable written evaluation from Dr. Eidt covering the entire time period that Plaintiff was a resident working under Eidt at the University of Arkansas.

bias against Plaintiff with the PACE program with the objective of preventing Plaintiff from having a fair and objective assessment.

66.

On June 18, 2012, the trial court in *Civil Action No. 60CV-11-1990* held a hearing on both *Plaintiff's Motion to Compel*, and *Defendants' Motion for Partial Summary Judgment*. During the time period that both of these motions were pending for resolution by the trial court, a representative of the Baptist Health Defendants attempted to coerce Plaintiff into voluntarily dismissing his cause of action (*Civil Action No. 60CV-11-1990*), and stated to counsel for Plaintiff (in the presence of Plaintiff) that if he didn't dismiss his lawsuit, Plaintiff would have to either "admit that he had done something wrong to the Arkansas State Medical Board, or lose his medical license."

67.

On June 29, 2012, the trial court in *Civil Action No. 60CV-11-1990* entered an Order on *Plaintiff's Motion to Compel*, wherein he granted the motion with respect to 7 discovery requests, denied the motion with respect to 37 discovery requests, and ordered that certain "documents and information were to be produced to the court in-camera to determine the privilege," with respect to the remaining 9 discovery requests that were subject to Plaintiff's motion to compel.

68.

On July 9, 2012, the trial court in Civil Action No. 60CV-11-1990 entered its *Order Granting Defendants' Motion for Partial Summary Judgment*.

69.

On August 2, 2012, the trial court in *Civil Action No. 60CV-11-1990* denied Plaintiff's motion for reconsideration of discovery requests that had sought, among other things, what Plaintiff thought to be discoverable information relevant to showing racial disparities that would be necessarily contained solely in certain peer review records exclusively in the possession of Baptist Health Medical Center.

70.

In December 2012 Plaintiff was recertified by the American Board of Surgery with his recertification set to expire in July 2023.

71.

In February 2013, Plaintiff notified the Arkansas State Medical Board about his recertification and requested that the same be considered in lieu of him having to complete a physician assessment program.

72.

On March 5, 2013, upon consideration of *Plaintiff's Motion to Voluntary Non-Suit* his cause of action as a matter of right, the trial court in *Civil Action No. 60CV-11-1990* entered an *Order of Voluntary Dismissal*, and dismissed Plaintiff's cause of action without prejudice to re-file, in accordance with Ark. R. Civ. P. 41.

73.

On April 4, 2013, the Arkansas State Medical Board voted unanimously to commend Plaintiff for passing the American Board of Surgery exams, but informed him that he must complete the physician

assessment program or have a hearing before his license renewal date in November 2013.

74.

On August 1, 2013, the Arkansas State Medical Board voted to proceed with a disciplinary hearing against Plaintiff in October 2013 unless Plaintiff successfully completed the physician assessment program.

75.

On August 2, 2013, Plaintiff applied to attend the KSTAR Physician Assessment Program at Texas A&M University Health Science Center. He paid a total amount of $ 13,000.00 in costs and fees for the assessment. He successfully completed the testing dates on September 5-6, 2013, and the KSTAR Meeting and Determinations on September 30, 2013. The Final Report was prepared on October 9, 2013, and the surgeon who interviewed Plaintiff during his assessment indicated that he would not place any restrictions on Plaintiff's ability to continue his surgical practice.

76.

In December 2013, the Arkansas State Medical Board voted to allow Plaintiff to renew his medical license and accept the KSTAR evaluation in lieu of the PACE assessment program recommended by the Board, but the Board further voted that clarification was required to be received from KSTAR and presented at the Board's February 6, 2014 Board meeting.

77.

On December 23, 2013, the Board, through counsel, wrote the Medical Director of the KSTAR program and provided certain information for his consideration, to include, a "[c]opy of a lawsuit that was filed involving Baptist Medical Center, Little Rock, and Dr. Williams." Notably absent from the materials submitted by the Board to KSTAR was any information related to the surgical cases at issue. According to the correspondence from the Board, it was furnishing the supplemental information to KSTAR "in the hopes that it would give ... a more complete picture of what has happened with Dr. Williams."

78.

On February 25, 2014, Plaintiff re-filed his action against Baptist Health Medical Center in Pulaski County Circuit Court, *Civil Action No. 60CV-14-808*, and added the Arkansas State Medical Board as a named defendant because the Board failed to accept Plaintiff's completion of the KSTAR program, and in light of the other facts and circumstances surrounding Plaintiff's treatment by the State Medical Board since October 2010, even though there had been no hearing held and no finding made by the Board that Plaintiff had violated the Arkansas Medical Practices Act. See *A.C.A. § 17- 95-409 (a)(2)(G)* provides that the Arkansas State Medical Board may revoke an existing license, impose penalties as listed in § 17-95-410, or refuse to issue a license in the event the holder or applicant, as the case may be, has committed any of the acts or offenses defined in this section..

79.

Based upon meetings with the Arkansas State Medical Board, and notwithstanding that there had

never been a hearing[16] held where Plaintiff was permitted to cross-examine the witnesses against him,[17] there had already been several adverse actions taken against Plaintiff by the Board which affected his ability to engage in the practice of medicine: (1) Plaintiff performed surgical procedures with a proctor from December 2010 through December 2011; (2) Plaintiff ceased to perform any surgical procedures after his June 8, 2012, appearance before the Board pending completion of the physician assessment program; and (3) Plaintiff attended and completed the physician assessment program at Texas A&M University in September 2013.

80.

The Arkansas State Medical Board was served with the lawsuit (*Civil Action No. 60CV-14- 808*) that was filed by Plaintiff on February 25, 2014, by personal service on Beck, Chairman of the Arkansas State Medical Board on March 7, 2014. The Complaint, received by Chairman Beck on March 7, 2014 clearly

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[16] *A.C.A. § 17-95-410 (e)(1)* provides in relevant part that, "[a]t the conclusion of the hearing, the board shall first decide whether the accused is guilty of the charges against him or her and then decide on appropriate disciplinary action." Section *(e)(3)* of the same statute provides that *if the accused is found guilty* of the charges against him or her, then the board is authorized to take one or more of specifically designated adverse actions.

[17] *A.C.A. § 17-95-410(a)* provides in relevant part that, "[a]ny person may file a complaint with the Arkansas State Medical Board against any person having a license to practice medicine in this state charging the licensee with ... [t]he commission of any of the offenses enumerated and described as unprofessional conduct in § 17-95-409." To date, there has/had been no complaint filed against Plaintiff with respect to the four cases at issue that complies with *A.C.A. § 17-95-410(a)*.

indicated that McKissic was no longer representing Plaintiff, and that Plaintiff was seeking to have the trial court in *Civil Action No. 60CV-14-808* enjoin any further proceedings against Plaintiff by the Board.

81.

In the Complaint (*Civil Action No. 60CV-14-808*), in addition to expressly pleading for injunctive relief and asking the trial court to enjoin the upcoming scheduled hearing, Plaintiff also specifically referenced that, "[o]n January 22, 2014, the Arkansas State Medical Board wrote counsel for Plaintiff indicating that, the hearing involving Dr. Williams has been rescheduled to the April Board meeting, and that, "as soon as I have the exact date and time, I will let you know."

82.

After reading this statement in the Complaint, apparently the Board, through its attorney contacted Plaintiff's former counsel, Gene McKissic and learned that Plaintiff had not been served with notice[18] of the specific date and time for a hearing. McKissic informed the Board's counsel that Plaintiff had in fact retained new counsel, and that the Board needed to contact the new counsel with any questions about the lawsuit (*Civil Action No. 60CV-14-808*) and/or any matters pertaining to Plaintiff's medical license and the Arkansas State Medical Board.

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[18] See *A.C.A. § 17-95-410(c)(2)*, which requires that the Board send "by registered mail to the person's last known address of record a copy of the order and notice of hearing along with a ***written notice of the time and place of the hearing ...***"

83.

After being told in March 2014, that Mr. McKissic no longer represented Plaintiff, and without otherwise sending written notice to Plaintiff that it would go forward with a hearing on April 3, 2014, notwithstanding Plaintiff's request for injunctive relief in *Civil Action No. 60CV-14-808*, the Board, went forward with a hearing in Plaintiffs absence and revoked his medical license in April 2014. At the time that the Arkansas State Medical Board revoked Plaintiff's medical license in April 2014, as a result of the hearing held on April 4, 2014, the defendants knew that Plaintiff had no knowledge that the hearing was to be held on that date and they wanted to go forward anyway so that Plaintiff could not be present to defend himself.[19]

84.

On April 30, 2014, the Board submitted a report to the National Practitioner Data Bank stating that the Board had revoked Plaintiff's medical license because Plaintiff had "violated the Medical Practices Act, in that he exhibited gross negligence and ignorant malpractice in the manner in which he performed diagnostic workup and surgical procedures."

85.

Plaintiff filed an appeal and a *Petition for Judicial Review* of the Board's Order revoking his medical license in Pulaski Circuit Court on May 2, 2014,

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[19] *See A.C.A. § 17-95-410 (e)(1)*, ("At the conclusion of the hearing, the board shall first decide whether the accused is guilty of the charges against him or her and then decide on appropriate disciplinary action.")

Civil Action No. 60CV-14-1739. On that same date, Plaintiff filed a *Motion to Stay Order Revoking Medical License*, and attached thereto an Affidavit of Gene McKissic, which clearly evidenced that Plaintiff had not been notified of the date and time for the hearing that was held in his absence.

86.

On April 15, 2015, just two days prior to a scheduled hearing on *Plaintiff's Motion for Declaratory Judgment*, that had been filed in both *Civil Action No. 60CV-14-1739* and *Civil Action No. 60CV-14-808* on December 1, 2014, and *Plaintiff's Motion to Compel* discovery from the Arkansas State Medical Board that was filed in *Civil Action No. 60CV-14-808* on March 3, 2015, the trial court in entered an Order for the parties to engage in a settlement conference to address the issues raised in both cases.

87.

The parties held settlement conferences on May 12, 2015, and on June 4, 2015, and a tentative agreement was reached with proposed consent orders to be drafted and entered in both *Civil Action No. 60CV-14-808*, and *Civil Action No. 60CV-14-1739*. However, after the parties exchanged proposed "consent orders," on August 19, 2015, Plaintiff filed a motion to enforce settlement agreement because the Board rejected Plaintiff's proposed order, and the Board's proposed order contained terms different from those agreed to by Plaintiff during the settlement conference.

88.

On October 5, 2015, the trial court entered an order directing the parties to execute the proposed order prepared by the Board finding that "it properly

reflects the settlement agreement between the parties to this action."[20] Under the Board's consent order, Williams dismissed *Civil Action No. 60CV-14-1739* with prejudice, and dismissed the Board defendants from *Civil Action No. 60CV-14-808* with prejudice. The Board reinstated Plaintiff's medical license and agreed to postpone disposition and/or disciplinary action to be taken on the four surgical cases at issue until the final disposition of *Civil Action No. 60CV-14-808*. The Board's consent order was executed as ordered and filed on November 3, 2015.

89.

On November 3, 2015, the Board submitted a report to the National Practitioner Data Bank stating that effective October 30, 2015, there was a "revision to state licensure action," and that Plaintiff's license was "restored or reinstated, conditional," and that the basis for initial action was, "substandard or inadequate care."

90.

Because during the settlement discussions, it was clear that Plaintiff had no notice of the April 2014 hearing, and that Plaintiff's offer of settlement was based upon the voiding and rescinding of the National Practitioner Data Bank report, and his being placed in the same position as he was in before the April hearing took place, Plaintiff disputed the accuracy of the report pursuant to the procedures authorized by the Department of Health and Human services. After

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[20] To the extent that it relates to other errors to be enumerated in Plaintiff's appeal of *Civil Action No. 60CV-14-808*, this Order may too be subject to appeal, but the decision regarding whether there will be an appeal of this Order has not yet been made, and is not otherwise material to the allegations being raised in this federal action.

requesting and receiving correspondence from both Plaintiff and the Board, the Secretary of the U.S. Department of Health and Human Services agreed with Plaintiff and on November 25, 2016, ordered that both the April 30, 2014 National Practitioner Data Bank reports submitted and the November 3, 2015 report by the Board against Plaintiff be voided because they were "not required to be filed; the action does not meet the legal reporting criteria."

91.

After it had first refused to void the data bank report itself, and after the Department of Health and Human Services unilaterally voided the report submitted by the Arkansas State Medical Board against Plaintiff on November 25, 016, on December 6, 2016, the Arkansas State Medical Board again submitted a report to the National Practitioner Data Bank stating that there was a "limitation or restriction" on Plaintiff's medical license effective October 30, 2015, stating as its basis, the Consent Order that Plaintiff was ordered to execute by the trial court in *Civil Action No. 60CV-14- 808*.

92.

The publishing of these reports by the Arkansas State Medical Board was done at the direction of Defendant Beck, acting as Chairman of the Arkansas State Medical Board, and was intentional, and done with malice, with the specific intent to interfere with Plaintiff's ability to earn a living by engaging in the practice of medicine in the State of Arkansas.

93.

Plaintiff engaged in protected activity when he

filed his *Complaint for Damages and Injunctive Relief* in Pulaski Circuit Court (*Civil Action No. 60CV-14-808*) on February 24, 2014, wherein he alleged among other things, racial discrimination, a matter of public concern. In *Civil Action No. 60CV-14-808*, he alleged that the named defendants, to include members of the Arkansas State Medical Board, an agency of the state of Arkansas, who had used their positions to engage in racial discrimination against Plaintiff on the basis of his race, Black.

94.

Because they knew that Plaintiff would not appear at the hearing held on April 3, 2014, due to a lack of proper notice of the same, as part of the conspiracy to retaliate against Plaintiff for complaining about racial discrimination, the agents, employees, and/or representatives of the Arkansas State Medical Board went forward with the hearing and revoked Plaintiff's medical license in retaliation for him filing *Civil Action No. 60CV-14-808*.

95.

In addition to terminating Plaintiff's ability to continue to engage in the practice medicine and earn a living, the defendants engaged in the conspiracy to revoke Plaintiff's medical license not in furtherance of quality health care, but in order to make it more difficult for him to pursue his claims against Baptist Health Medical Center, and the other named defendants in *Civil Action No. 60CV-14- 808*.

96.

Like the individual defendants who discriminated against Plaintiff on the basis of his race,

Black, during the disciplinary proceedings commenced against him at Baptist Health Medical Center, Little Rock, the Arkansas State Medical Board's revocation of Plaintiff's medical license was knowingly discriminatory, arbitrary and capricious, as the Board was used maliciously, and intentionally to deprive Plaintiff of his livelihood, and to treat Plaintiff differently than other similarly situated white physicians who committed acts and/or omissions far worse than those alleged to have been committed by Plaintiff.

97.

The Board's intent is clear as evidenced by the adverse actions suffered by Plaintiff as a result of the false and malicious adverse action reports submitted by the Arkansas State Medical Board to the National Practitioner Data Bank. As demonstrated below, these reports were published to various entities to which Plaintiff sought to engage in business and/or contractual relationships where it was vital that he utilize his Arkansas State Medical license.

98.

On July 26, 2016, Plaintiff's application to enter into a provider contract with Cigna HealthSpring was denied because it queried and received publication of the false National Practitioner Data Bank report submitted by the Arkansas State Medical Board.

99.

On August 25, 2016, Plaintiff's application to enter into a network provider contract with Aetna was denied because it queried and received publication of the false National Practitioner Data Bank report

submitted by the Arkansas State Medical Board.

100.

On September 21, 2016, QualChoice denied Plaintiff's application to become a contract network provider due to "licensing board information," and "privileging information," obtained because it queried and received publication of the false National Practitioner Data Bank report submitted by the Arkansas State Medical Board.

101.

On November 4, 2016, NovaSys Health Network denied Plaintiff's application to become a contract network provider because it concluded that "sanctions" had been imposed against Plaintiff by the Arkansas State Medical Board, after it queried and received publication of the false National Practitioner Data Bank reports submitted by the Arkansas State Medical Board.

102.

On March 7, 2017, WellCare denied Plaintiff's application to become a contract participating provider because of "State license adverse action," after it queried and received publication of the false National Practitioner Data Bank reports submitted by the Arkansas State Medical Board.

COUNT I

103.

Plaintiff adopts paragraphs 1 through 102, and incorporates them in Count I, as if fully stated herein.

104.

42 U.S. C. § 1981 provides that, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

105.

The acts hereinbefore alleged against the defendants constitute a violation of *42U.S. C. § 1981* for discrimination and retaliation, and the defendants are liable therefore jointly, and severally, in their individual and personal capacities.

COUNT II

106.

Plaintiff adopts paragraphs 1 through 105, and incorporates them in Count II, as if fully stated herein.

107.

The acts hereinbefore alleged constitute a violation of *42U.S.C. §§ 1981, and 1983* for discrimination and retaliation, and defendants are liable therefore jointly, and severally, in their individual and personal capacities because they engaged in a conspiracy with defendants Beck and Hearnsberger, who acted under the color and authority of state law, to effectuate the end result of the conspiracy to revoke Plaintiff's Arkansas medical license in retaliation against Plaintiff for filing *Civil Action No. 60CV-14-*

808, wherein he complained about racial discrimination, a matter of public concern.

108.

The acts hereinbefore alleged constitute a violation of *42U.S.C. § 1983* for retaliation under the *First Amendment* of the United States Constitution, and defendants are liable therefore jointly, and severally, in their individual and personal capacities because they engaged in a conspiracy with defendants Beck and Hearnsberger, who acted under the color and authority of state law, to effectuate the end result of the conspiracy to revoke Plaintiff's Arkansas medical license in retaliation against Plaintiff for seeking redress and requesting assistance from the Arkansas State Medical Board to investigate perceived racial discrimination. Plaintiff had filed a written request with the Arkansas State. Medical Board seeking help in June 2010, after the adverse action had been taken against him by Baptist Health Medical Center in April 2010. Baptist Health Medical Center filed a report with the National Practitioner Data Bank two weeks later on June 24, 2010 even though it maintained throughout the litigation in *Civil Action No. 60CV-14-808*, that Plaintiff was never summarily suspended, and even though the adverse action taken by Baptist Health Medical Center did not become final until April 2011.

109.

These acts hereinbefore alleged constitute a violation of *42U.S.C. § 1983* for retaliation under the *First Amendment* of the United States Constitution, and defendants are liable therefore jointly, and severally, in their individual and personal capacities because they engaged in a conspiracy with defendants

Beck and Hearnsberger, who acted under the color and authority of state law, to effectuate the end result of the conspiracy to revoke Plaintiff's Arkansas medical license in retaliation against Plaintiff for filing *Civil Action No. 60CV-14-808*, wherein he complained about racial discrimination, a matter of public concern.

COUNT III

110.

Plaintiff adopts paragraphs 1 through 109, and incorporates them in Count III, as if fully stated herein.

111.

The acts hereinbefore alleged constitute a denial of equal protection of the laws, as well as both procedural and substantive due process in violation of *42U.S.C. § 1983* and the *Fourteenth Amendment* of the United States Constitution, and defendants are liable therefore jointly, and severally, in their individual and personal capacities because they engaged in a conspiracy with defendants Beck and Hearnsberger, who acted under the color and authority of state law, to effectuate the end result of the conspiracy to deprive Plaintiff of a property right, by revoking his Arkansas medical license because of his race without giving him adequate notice and a meaningful opportunity to first challenge the charges against him.

112.

Further, the acts hereinbefore alleged constitute a denial of equal protection of the laws, as well as both procedural and substantive due process in violation of *42U.S.C. § 1983* and the *Fourteenth Amendment* of the United States Constitution, and defendants are liable

therefore jointly, and severally, in their individual and personal capacities because they engaged in a conspiracy with defendants Beck and Hearnsberger, who acted under the color and authority of state law, to effectuate the end result of the conspiracy to deprive Plaintiff of the liberty interest in his professional reputation because of his race by publishing stigmatizing statements about him related to the revocation of his medical license without ever giving him the opportunity to refute the same.

COUNT IV

113.

Plaintiff adopts paragraphs 1 through 112, and incorporates them in Count IV, as if fully stated herein.

114.

42 U.S.C. § 1982 provides that, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

115.

The acts hereinbefore alleged against the defendants constitute a violation of *42 U.S.C. § 1982* for discrimination with the intent to deprive Plaintiff of his ability to fully hold, use and enjoy his real property located at 9712 W. Markham Street, Little Rock, Arkansas based upon his race, Black, and the defendants are liable therefore jointly, and severally, in their individual and personal capacities.

COUNT V

116.

Plaintiff adopts paragraphs 1 through 115, and incorporates them in Count V, as if fully stated herein.

117.

The defendants are liable individually, jointly and severally pursuant to the Arkansas state law tort of abuse of process for revoking Plaintiff's Arkansas medical license in order to coerce him to drop and/or to deter him from continuing to pursue the civil claims alleged in *Civil Action No. 60CV- 14-808*.

COUNT VI

118.

Plaintiff adopts paragraphs 1 through 117, and incorporates them in Count VI, as if fully stated herein.

119.

The defendants are liable individually, jointly and severally pursuant for tortious interference with contracts for their purposeful, and malicious conduct in knowingly revoking Plaintiff's Arkansas medical license in his absence, without providing adequate and proper notice, and subsequently reporting stigmatizing statements relating thereto in order to interfere with Plaintiff's contractual and business relationships with his patients, insurance providers, and other hospitals.

120.

The defendants caused the revocation of Plaintiff's Arkansas medical license in April 2014 with the intent to interfere with Plaintiff's ability to fulfill his contractual obligations with his patients, insurers, and business expectancy to continue to provide

complete, unrestricted, medical and surgical services to his patients at his Markham Street medical office.

COUNT VII

121.

Plaintiff adopts paragraphs 1 through 120, and incorporates them in Count VII, as if fully stated herein.

122.

The defendants are liable individually, jointly and severally for defamation with respect to any and all such false, defamatory statements that relate to Plaintiff s competency as a physician and that relate to the revocation of Plaintiff's Arkansas medical license in April 2014, and that have been and/or may be published to any hospital, insurance provider, insurer, patient, or other person(s) from the date beginning one year prior to the filing of this action.

WHEREFORE, Plaintiff prays for temporary and permanent injunctive relief from the Court and judgment against the defendants as follows:

(A) That the Plaintiff have permanent injunctive relief against all of the defendants preventing and precluding the continuation of any conduct or actions taken in furtherance of the conspiracy being practiced against Plaintiff, including, but not limited to reinstatement of Plaintiff's medical staff privileges;

(B) That the Plaintiff have an injunction against the Arkansas State Medical Board requiring the Board to correct the reports that it has

sent to the National Practitioner Data Bank;

(C) That Plaintiff recover compensatory damages from the defendants individually, jointly and severally, in an amount in excess of $75,000.00 and said amount to be determined at trial;

(D) That Plaintiff recover exemplary and/or punitive damages from the defendants individually, jointly, and severally, in an amount to be determined at trial;

(E) That Plaintiff be granted a trial by jury with respect to all issues triable to a jury;

(F) That Plaintiff recover all costs and attorneys fees associated with the prosecution of this action;

(G) That the defendants be enjoined from further retaliating against the Plaintiff;

(H) That all of the defendants to include all Baptist Hospital Committees and the Arkansas Medical Board be ordered to make and keep accurate, reliable and certifiable minutes at each stage of any investigation; and

(I) That Plaintiff have such other and further relief as the Court deems equitable, just and proper.

Respectfully submitted,

By: _____
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Case No. 18-2423

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VICTOR B. WILLIAMS, M.D., Appellant,

vs.

Appellees.

Appeal from the U.S. District Court for the Eastern District of Arkansas Honorable James Moody, District Judge Case No. 4:17-CV-205-JM

PETITION FOR REHEARING AND/OR REHEARING EN BANC

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NOW COMES PLAINTIFF, by and through counsel, and pursuant to Rules 35, and 40 of the Federal Rules of Appellate Procedure, and files this his Petition for Rehearing and/or Rehearing En Banc. In support of his petition, Plaintiff states that the panel decision conflicts with the following cases decided by the United States Supreme Court: England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964); Wallace v. Kato, 549 U.S. 384 (2007); Dennis v. Sparks, 449 U.S. 24 (1980); and Amtrak v. Morgan, 536 U.S. 101, 110 (2002); as well as the following cases decided by the Eighth Circuit Court of Appeals: Ripplin Shoals Land Co., LLC v. United States Corps of Eng'rs, 440 F.3d 1038 (8th Cir. 2006); Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982); Madison v. IBP, Inc., 330 F.3d 1051 (8th Cir. 2003), and Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985). Therefore, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions. Specifically, the panel's decision affirming the district court's orders baring Plaintiff's claims on the grounds of res judicata in whole or in part, is inconsistent with the holdings in these cases as they apply to the claims raised in Plaintiff's federal cause of action.

The panel's decision contravenes the holding in Ripplin Shoals Land Co., LLC v. United States Corps of Eng'rs, 440 F.3d 1038, 1042 (8th Cir. 2006) that, "res judicata does not apply to claims that did not exist when the first suit was filed." See also Appellant's Brief, pp. 26-27. The Court in Ripplin also rejected the res judicata defense because, "the same cause of action is not involved in both cases." Ripplin, at 1042. Contrary to the district court's holding otherwise, Plaintiff contends that his motion for rehearing should be granted because a new, separate and independent cause of action arose under federal law when the Arkansas State Medical Board revoked his medical license in April 2014, without regard to his then pending state court claims.

"Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon state common law. A litigant may pursue a section 1983 action rather than, or in addition to, state remedies." Garmon v. Foust, 668 F.2d 400, 406 (8th Cir. 1982). The United States Supreme Court in Wallace v. Kato, 549 U.S. 384, 388 (2007) held that, "[w]hile we have never stated so expressly, the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law." In Wallace, while explaining the difference between false arrest and false imprisonment, the Court noted that, "[i]f there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process and arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself." Id., at 390.

Similarly here, damages recoverable from the alleged intentional, false reporting of the 2014 medical

license revocation as alleged in the abuse of process claim[1] are distinct from the damages arising from the revocation itself, which caused a separate, but related injury to Plaintiff's liberty interest in his professional reputation. See Fleury v. Clayton, 847 F.2d 1229, 1233 (7th Cir. 1988), ("We conclude that a censure of a physician in Illinois deprives the physician of part of the property interest in his license–both because Illinois has created a legitimate claim of entitlement to a 'clean' license and because the formal censure, designed to deter repetition of the conduct in question may produce legal consequences in Illinois.") Unlike the physician in Fleury,[2] in addition to the continuous reports of the improper revocation of his medical license, Plaintiff meets the stigma-plus requirements to warrant relief under the Due Process Clause because in addition to the false reports that he committed "gross negligence," and/or "ignorant malpractice," Plaintiff was also without a license to practice medicine for over a year from April 14, 2014 until December 15, 2015. See Appellant's Brief, pp. 58-59.

It is undisputed that Plaintiff did not receive notice of the April 2014-hearing in accordance with A.C.A. § 17-95-410(c)(2).[3] See also Appellant's Brief, pp. 13-14. It is also undisputed that immediately after

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[1] See Peterson v. Worthen Bank & Trust Co., N.A., 296 Ark. 202, 203 (1988), ("One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed, is liable to another for the pecuniary loss caused thereby.")

[2] See Fleury, supra, at 1231, ("Because Illinois did not restrict Fleury's ability to practice, we do not have the stigma-plus-termination that might activate the Due Process Clause...")

[3] See Fleury, supra, at 1231, "If Illinois did not furnish Fleury the process its statutes require before imposing professional discipline, this is a matter of state law rather than federal law."

Plaintiff's medical license was revoked in April 2014, Plaintiff filed a motion to stay[4] the order revoking his medical license with the medical board and provided evidence from his former counsel establishing that Plaintiff had not been notified that the hearing would be held on that date. See Appellant's Brief, pp. 14-15. After his motion to stay was denied by the Arkansas State Medical Board, Plaintiff had no Arkansas medical license during the time period that he litigated two separate state court actions from April 2014 until December 2015. Finally, as evidenced by the documents filed in Plaintiff's federal action, Plaintiff's ability to engage in the practice of medicine continues to be effected by the Arkansas State Medical Board's improper reporting of the 2014 revocation of his medical license notwithstanding the Board's 2015 agreement that his medical license should be reinstated, and that he should be treated "as if the hearing didn't happen." See Appellant's Reply Brief, pp. 21-22.

Therefore, because the injuries to Plaintiff arising from the "discrete act" of the improper revocation of his medical license are continuing and ongoing, and because they first accrued after he filed his in state court cause of action, Plaintiff had a right[5] to

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[4] See Farmer v. Everett, 648 S.W.2d 513, 517 (Ark. App. 1983), ("We emphasize here that the right to cross-examine witnesses in a proceeding before the Industrial Commission must be distinguished from the opportunity to cross-examine to the extent that though the right can be waived by the claimant, the opportunity cannot be restricted or denied claimant by the Commission.")

[5] As stated in Appellant's Brief at p. 28, Appellant did not present his section 1983 claims arising from the revocation of his medical license in April, 2014, to include the retaliation claim, to the state court in Williams I for disposition, but instead expressly reserved

elect and wait and bring his section 1983 cause of action in federal court after it accrued and before the expiration of the statue of limitations expired, notwithstanding his pending state court cause of action. "Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitation commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable." Id., at 391.

By affirming the district court's holding that Plaintiff's claims are barred by the doctrine of res judicata, the panel's opinion implicitly holds that the April 2014 revocation of Plaintiff's Arkansas medical license without a hearing is not a "discrete act," as that term is defined by Eighth Circuit Court of Appeals and United States Supreme Court precedent, entitling Plaintiff to the right to file a separate cause of action in federal court. See Madison v. IBP, Inc., 330 F.3d 1051, 1061 (8th Cir. 2003), ("discrete acts are easy to identify and each act constitutes a separate actionable unlawful employment practice, whereas hostile environment claims by their very nature involved repeated conduct."); Amtrak v. Morgan, 536 U.S. 101, 110 (2002), ("A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'")

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any such claims related to the April, 2014 revocation of his medical license pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421 (1964).

CONCLUSION

As a result of the ongoing harm that Plaintiff continues to suffer as a result of the licensure revocation reporting by the Board, Plaintiff's petition for rehearing should be granted, he should be granted appropriate relief, to include at the very least, a ruling that Plaintiff's state law claims should be stayed and/or dismissed without prejudice since the medical cases at issue have been remanded by the state court to the Arkansas State Medical Board for disposition after final resolution of Plaintiff's state court action, which currently remains pending in the Arkansas appellate courts. "The court may decide sua sponte that abstention is proper." Edwards v. Arkansas Power & Light, 683 F.2d 1149, 1156 FN9 (8th Cir. 1982).

Respectfully submitted, this 12th day of June 2018.
By: s/s Eric E. Wyatt, Esq.

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7/15/2019

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No: 18-2423
Victor Bernard Williams, M.D.
Appellant
v.
Baptist Health, doing business as Baptist Health Medical Center, et al.
Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:17-cv-00205-JM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 15, 2019

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans